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Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board

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Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*

WILLIAM B. GOULD IV**

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INTRODUCTION

It is a privilege and honor to give the inaugural William R. Stewart Lecture here at Indiana University School of Law–Bloomington. I am grateful to Dean Lauren Robel, Professor Kenneth Dau-Schmidt, and the Stewart family, particularly Bill's brother Stanley Stewart, for their role in making this lecture series a reality.

This is an opportunity to celebrate the life of William R. Stewart, who believed so much in the principles of the National Labor Relations Act ("Act" or NLRA), the administration and enforcement of which he played a key role in for nearly four decades. Bill Stewart loved the law, along with the Indiana Law School. Many here know that Bill was the first and only National Labor Relations Board (NLRB) lawyer or employee in the NLRB's entire seventy-one (going on seventy-two) year history to be given the highest honor that any civil servant can receive in the United States government—the President's Award for Distinguished Federal Civilian Service. In presenting this award in 1997, President Bill Clinton stated that Bill's contribution to the NLRB was "unparalleled."¹

* This Article is based upon the inaugural William R. Stewart Lecture given at Indiana University School of Law–Bloomington on October 31, 2006. I express my gratitude to Erik Christensen, Stanford Law School '08, and Ashley Walter, Stanford Law School '09, for their valuable research assistance. Of course, I take full responsibilities for any deficiencies or errors in this Article.

** Charles A. Beardsley Professor of Law, Emeritus at Stanford Law School; Chairman of the National Labor Relations Board (1994–98); Member of the National Academy of Arbitrators since 1970.

1. Press Release, Nat'l Labor Relations Bd., Office of the Gen. Counsel, William R.

In 2006 and 2007, the labor law system in the United States with which both Bill and I worked in the tumultuous 1990s,² much of the workplace environment that surrounds it, and the political framework for oversight—including the labor law reform process and the appointment process—are fundamentally dysfunctional. Little attention has been given to this matter in recent years because in this century it suited all of the major pillars of government—the executive, legislative, and even judicial branches—just fine. The reasons for the labor law malaise—a phenomenon that has been building for the past four decades—are numerous.³

In a sense, we have seen this movie before. Even prior to important decisions by the United States Supreme Court⁴ and the NLRB Board (“Board”)⁵ that carefully circumscribed the remedial authority of the NLRB, the Pucinski Committee held hearings in the 1960s relating to the inadequacies of the NLRA.⁶ In the 1970s, several administrative loopholes became apparent. Representation proceedings and unfair labor cases could be delayed, which undermined the effectiveness of remedies rendered late in the day. But, until the 1970s—under albeit a sometimes uneasy adversarial relationship—there was a kind of *modus vivendi* in which labor and management accorded respect to one another, both acknowledging each other’s existence. Never partners,⁷ as in Germany,⁸ the parties nonetheless operated together.

Stewart, Former NLRB Lawyer, Wins Presidential Award for Distinguished Service (June 5, 1997), *available at* http://www.nlr.gov/shared_files/Press%20Releases/1997/r2226.html.

2. See generally WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR* (2000) [hereinafter GOULD, *LABORED RELATIONS*].

3. See William B. Gould IV, *Discussion*, 58 LAB. & EMP. REL. ASS’N 150 (2006) [hereinafter Gould, *Discussion*].

4. See, e.g., *Pattern Makers’ League v. NLRB*, 473 U.S. 95 (1985) (holding that union members who are strikebreakers have a protected right to resign from the union at any time); *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981) (holding that plant closures are not a mandatory subject of bargaining even where employees lose jobs); *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (holding that the Board is not authorized to impose contract terms as a remedy); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (holding that the remedies of the Act provide compensation that requires mitigation of damages and the deduction of interim earnings from back pay). These cases, and other authorities, are discussed in WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* (1993) [hereinafter GOULD, *AGENDA*]. See generally Paul Weiler, *Promises To Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (on the subject of remedies).

5. See, e.g., *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970) (holding that the statute does not authorize an award of lost compensation attributable to an employer’s resort to administrative avenues that delay the NLRB process), *modified*, *Int’l Union v. NLRB*, 449 F.2d 1046 (D.C. Cir. 1971), *modified*, *Ex-Cell-O Corp. v. NLRB*, 449 F.2d 1058 (D.C. Cir. 1971); *cf.* *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). *But see* *NLRB v. Food Store Employees Union*, 417 U.S. 1 (1974); *Int’l Union of Elec. v. NLRB (Tiidee Products)*, 426 F.2d 1243 (D.C. Cir. 1970).

6. *Hearings on Administration of the Labor-Management Relations Act by the NLRB Before a Subcomm. of the H. Comm. on Education and Labor*, 87th Cong. (1961); see also Philip Ross, *The Role of Government in Union Growth*, 350 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 75 (1963).

7. Justice Blackmun noted that “[I]n establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would

The shift of the political pendulum through new presidential appointments translated itself into labor-management relations law changes from one Board to another. This emerged beginning with the Eisenhower Administration, as the first Republican Administration to have a chance at affecting the 1935 law through the appointments process. The presidencies of Dwight D. Eisenhower, John F. Kennedy, and Richard Nixon all witnessed a shift in Board direction, principally through doctrinal reinterpretations of the Act that tilted toward management in the time of Republican administrations and labor in those controlled by Democrats.⁹

In the 1980s, the Reagan Board, chaired by Donald Dotson, produced what was at that time viewed as unprecedented bitterness and divisiveness—a problem exacerbated by an ever-increasing backlog of cases that yielded concerns about the denial of justice through delay¹⁰—more considerable than in the past.¹¹ Addressing this issue became a focus for the Bush I Board in the late 1980s and early 1990s, with some modest initiatives that cut into the backlog. My Clinton Board in the mid-1990s attempted to dig out from under the backlog debris left in the 1980s and to steer a central “third way” course through the competing interests of labor, management, and individual employees, while actively protecting the affirmative provisions of the Act supporting intervention so as to promote self-organization.¹² I think that we were relatively successful in this task, though we had enormous production problems and suffered from backsliding in case production—particularly the big cases involving major issues—during the 1997–98 period.

But meanwhile, the fundamental problems—delay in the administrative process¹³ and ineffective remedies—remained untouched by Congress, despite many calls for

become an equal partner in the running of the business enterprise in which the union's members are employed.” *First Nat'l*, 452 U.S. at 676.

8. William B. Gould IV, *Workers in Management: Northern Europe's Labor Laboratory*, THE NATION, Sept. 11, 1976, at 210 (chronicling the development of codetermination and dissatisfaction with traditional collective bargaining in post-World War II Europe).

9. Cf. Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93 (1954) (explaining why the work of the NLRB is bound up with the political process).

10. Cf. Issue 4 Table of Contents, 12 LAB. L. J. (1961). This problem was addressed by President Kennedy's NLRB Chairman Frank McCulloch in his confirmation hearings.

11. GOULD, AGENDA, *supra* note 4, at 22. For a discussion of earlier controversy at the NLRB, see generally JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD (1974), JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION, 1937–1974 (1981); and HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS (1950).

12. This is in accord with the Preamble of the Act which promotes the right to engage in self-organization and collective bargaining and not the philosophy contained in the Taft-Hartley amendments, which also protects the right to refrain from so doing. As Bill Stewart pointed out to me at the conclusion of my own confirmation hearing, I did not properly emphasize the absence of the right to refrain in the Preamble in my colloquy with Senator Hatch. *Senate Confirmation Hearings on Professor William B. Gould IV Before the Sen. Comm. on Labor and Human Resources*, 103rd Cong. 20–21 (1993) [hereinafter *Gould Hearings*].

13. I addressed this earlier debate in William B. Gould IV, *Prospects for Labor-Law Reform*, THE NATION, Apr. 16, 1977, at 466. For discussions about the 1960s, see generally SOLOMON BARKIN, THE DECLINE OF THE LABOR MOVEMENT: A REPORT TO THE CENTER FOR THE STUDY OF DEMOCRATIC INSTITUTIONS (1961); William B. Gould IV, *Taft-Hartley Revisited: The*

labor law reform from the 1960s onward. The primary concern here was and is an inefficient recognition process where a labor-management relationship is first established—an approach that is unresponsive to the fragility of the collective bargaining relationship when it is in its embryonic stages.

In the 1990s, there were numerous¹⁴ changes in labor-management relations in the form of the relentless and precipitous decline of organized labor as representing employees in the workforce—down to 7.8 percent in the private sector covered by the Act in 2005. In 2006, the downward trend continued to 7.4 percent.¹⁵ The political parties also became polarized.¹⁶ The contentiousness at the Board about NLRB

Contrariety of the Collective Bargaining Agreement and the Plight of the Unorganized, 13 LAB. L. J. 348 (1962); A.H. Raskin, *The Squeeze On the Unions*, 207 ATLANTIC MONTHLY 55 (1961).

14. Indeed, the union/nonunion wage differential has been a contributor. ROBERT FLANAGAN, *LABOR RELATIONS AND THE LITIGATION EXPLOSION* (1987); Eduardo Porter, *Unions Pay Dearly for Success*, N.Y. TIMES, Jan. 29, 2006, at BU4. The pattern continues through 2006:

Union members continued to earn higher wages than nonunion workers [the Labor Department's Bureau of Labor Statistics] said. In 2006, union members working full time had median weekly earnings of \$833, compared with a median of \$642 for those not represented by a union. This compares to median weekly earnings of \$801 for union members and \$622 for nonunion workers in 2005.

Union Membership Rates Dropped in 2006 to 12 Percent; Manufacturing Leads the Way, Daily Lab. Rep. (BNA) No. 17, at D-1 (Jan. 26, 2007) [hereinafter *Union Membership Rates*].

Additionally, there is the factor of union lethargy and inactivity which cannot be dismissed; this lethargy is at least partially responsible for not only union decline but also the decrease in charges and petitions filed by unions with the NLRB.

15. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *UNION MEMBERS IN 2005* (Jan. 20, 2006), available at http://www.bls.gov/news.release/archives/union2_01202006.pdf. For the Bureau's 2006 data, see, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *UNION MEMBERS IN 2006* (Jan. 25, 2007), available at http://www.bls.gov/news.release/archives/union2_01252007.pdf. For a discussion of the 2006 statistics, see Steven Greenhouse, *Sharp Decline in Union Members in '06*, N.Y. TIMES, Jan. 26, 2007, at A17. In 2006, the union share of manufacturing jobs dropped to 11.7 percent. *Id.*

The share of U.S. wage and salary workers who were members of a labor union fell to 12.0 percent in 2006, down from 12.5 percent in 2005, the Labor Department's Bureau of Labor Statistics reported Jan. 25.

Union membership declined by 326,000 members to 15.4 million last year, BLS found. Except for 2005, when the proportion of workers who belonged to unions remained steady, the decline in 2006 continued a trend that has spanned more than 20 years. In 1983, the first year for which comparable data were available, union membership was at 20.1 percent.

In the private sector, union membership in 2006 was 7.4 percent, down from 7.8 percent in 2005, accounting for a total loss of 274,000 members. In the public sector, the unionization rate for government workers was 36.2 percent in 2006, down slightly from the 36.5 percent rate in 2005. Within the public sector, local government workers had the highest unionization rate of 41.9 percent, which remained steady from the prior year, and the federal government had the lowest rate of 28.4, up slightly from 27.8 percent in 2005.

The total number of employed workers increased from 125.9 million in 2005 to 128.2 in 2006, the data show.

Union Membership Rates, *supra* note 14, at 4.

16. Joe Klein, *The Town That Ate Itself*, THE NEW YORKER, Nov. 23, 1998, at 78, 79.

appointments and confirmation hearings was the mirror image of increased division between labor and management, on the one hand, and Democrats and Republicans on the other. My October 1, 1993 hearing—to which Bill Stewart accompanied me—became the most graphic and hard fought of all of them. After nine months of delay,¹⁷ my confirmation—which received the greatest number of “no” votes of any Clinton nominee at that time—was born by virtue of the “batching” of Republican nominees with mine, a process completely unknown since the expansion of the NLRB from three to five members at the time of the Taft-Hartley amendments in 1947.¹⁸ This “batching,” which has become commonplace in this century, brought with it further delay in the confirmation process. The nominations would have to accumulate¹⁹ through the process and with that accumulation came expanded authority (and I would argue excessive intrusiveness) for the Senate in the performance of its “advise and consent” duty to make administrative agencies like the NLRB, in the words of noted Colby political scientist G. Calvin MacKenzie, “little more than the sum of the set of disjointed political calculations.”²⁰ Indeed, I was advised that Senator Nancy

17. See generally Anthony Lewis, *Abroad at Home; Running the Gauntlet*, N.Y. TIMES, Jan. 31, 1994, at A17.

18. Pub. L. No. 109-279, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C.); see generally Matthew M. Bodah, *Congressional Influence on Labor Policy: How Congress Has Inflicted Outcomes Without Changing the Law*, 50 LAB. L.J. 223 (1999); Matthew M. Bodah, *Congress and the National Labor Relations Board: A Review of the Recent Past*, 22 J. LAB. RES. 699 (2001). On March 2, 1994, all Senate Democrats voted to confirm me. But only five Republicans joined them.

19. As Professor MacKenzie has written:

[T]he tendency to select appointees to an agency as teams and to divide up control over the choices has become the norm in Washington. The Senate, in fact, often delays confirmation until several nominations to the same agency accumulate, thus allowing it to require that the President include some nominees who are effectively designated by powerful senators.

This kind of batching of nominations rarely happened before the present decade. Even on the regulatory commissions, whose original statutes require that only a bare majority of appointees can be from any one party, a vacancy in an opposition party chair was usually filled by the President with an enrollee in the opposition party who supported the President. These appointments, common for most of this century, came to be known as “friendly Indians” and were routinely confirmed by the Senate even when it was controlled by the opposition party. But they allowed the incumbent President to control the appointment process and to shape the majorities on most regulatory commissions.

That is nearly impossible these days. The membership of the regulatory commissions has become little more than the sum of the set of disjointed political calculations. Concerns about fealty to leadership, effective teamwork, and intellectual or ideological coherence play almost no part in the selection of regulatory commissioners. The juggling of political interests dominates. That we as a nation often get inconsistent and incoherent regulatory policies should be no surprise to those who follow the shuffling and dealing that produces regulatory commissioners.

G. CALVIN MACKENZIE, *STARTING OVER: THE PRESIDENTIAL APPOINTMENT PROCESS IN 1997*, at 30–31 (1998).

20. *Id.* at 31.

Kassebaum (R-Kansas), ranking Republican on the Labor Committee, would not approve any Republican nominee who would not pledge dissents from majority opinions of which I was a part.

Thus, during my time in Washington I became familiar with MacKenzie's writings and was amazed by the way that they resembled the reality in which Bill Stewart and I were both involved. MacKenzie stressed that this process was particularly troublesome in an agency like the NLRB, "which operates under statutory principles in which a large number of Republicans do not believe . . . [therefore] all of the incentives are weighted towards crippling the Agency."²¹ Notwithstanding the facts that Senator Mark Hatfield (R-Oregon) was the very best friend that the NLRB had during my tenure and that Representative David Obey (D-Wisconsin) was hostile and boorish to the NLRB, MacKenzie's maxim was correct: the Democrats tend to be more friendly to the Board—particularly when it is attempting to discharge its statutory responsibilities.²²

MacKenzie also noted that another phenomenon was closely related to the lack of administrative agency coherence associated with "batching": consequent loss of a "grand notion." Said MacKenzie:

The business of the people would be managed by leaders drawn from the people. Cincinnati, in-and-outers, noncareer managers—with every election would come a new sweep of the country for high energy and new ideas and fresh visions. The president's team would assume its place and impose the people's wishes on the great agencies of government. Not infrequently, it actually worked that way.

But these days, the model fails on nearly all counts. Most appointees do not come from the countryside, brimming with new energy and ideas. Much more often they come from congressional staffs or think tanks or interest groups—not from across the country but from across the street: interchangeable public elites, engaged in an insider's game.²³

This was to become a big problem in the 1990s, because subsequent to my confirmation, the Clinton Administration was compelled to live under divided government once the Republicans controlled Congress. The now-disgraced former Senate Majority Leader Trent Lott of Mississippi, identified with segregationist and white supremacist causes throughout the country,²⁴ named most or all of the first round of appointees who followed in my wake in 1997 and secured the unanimous

21. *Id.* at 39–40.

22. See GOULD, LABORED RELATIONS, *supra* note 2, at 269–70.

23. MACKENZIE, *supra* note 19, at 39–40.

24. For a backdrop of some of Senator Lott's activities, see William B. Gould IV, *140th Anniversary of the Emancipation Proclamation: Slavery's Lingering Legacy*, S.F. CHRON., Jan. 1, 2003, at A21. However, the Republican leadership put this matter behind them by electing Senator Lott as Minority Whip in 2006. See Mark Leibovich, *In Senate Shift, Big Comeback for Trent Lott*, N.Y. TIMES, Nov. 16, 2006, at A1. In 2006, very little attention was given to Senator Lott's past activities. Indeed, the *New York Times* referred to his praise of Senator Thurmond's 1948 Dixiecrat presidential campaign at Thurmond's 100th birthday party as a "joke." Adam Nagourney, *Hispanic is Expected to Be the Next Public Face of the G.O.P.*, N.Y. TIMES, Nov. 14, 2006, at A20. Very little attention was given to Lott's conduct by any of the press. Media Matters for America, *Media Glossed Over Lott's Praise of Thurmond Segregationist Campaign . . . Again*, Nov. 20, 2006, <http://mediamatters.org/items/200611200005>.

confirmation of my successor in 1999.²⁵ Senator Lott's control of appointments established a tone that intimidated the Democrats and encouraged the right wing. This, in turn, fostered inaction.

Others, besides Obey and Lott, who took considerable interest in the NLRB during this period were Congressman John Boehner of Ohio, the now-disgraced Randy "Duke" Cunningham of California and recently defeated Senator James Talent of Missouri, Congressman Henry Bonilla of Texas, Ernest Ishtook of Oklahoma, Ann Northrup of Kentucky, and Jay Dickey of Arkansas. To put it euphemistically, they were not particularly helpful.²⁶ The always politically difficult position of independent administrative agencies, a kind of isolated fourth branch of government, became more vulnerable, with devastating consequences for NLRB production of cases and the issuance of decisions. The difficulties that the Board endured in the 1990s played out to their logical conclusion in this century. The Bush II Board, in the early- and mid-2000s, has experienced declining production, an unprecedented failure to resolve cases, and equally unprecedented one-sided statutory interpretations.²⁷

Two points must be made preliminarily. The first is that it could be argued that *no* decisions are better than *any* decisions given the last-mentioned characteristic. I take it that this was the intention of the academic cry for oral argument in the healthcare nurse-supervisor cases.²⁸ In those cases, everyone knew that oral argument was irrelevant and a deliberate ploy to delay the case for another Board. But the average worker and employer need prompt resolution of cases no matter which Board is in power. Furthermore, the resolution of most of the cases is based upon credibility and factual determinations rather than policy issues relating to the law.

The second point undermining the importance of expeditious NLRB resolution of cases is that the law has a limited role in American labor-management relations, notwithstanding the harm that has been done through it.²⁹ Contrary to much commentary, some of it regrettably academic, the Act is not the principal reason for the poor state of labor-management relations in the country today or the decline of organized labor. That process has been moving forward ever since the mid-1950s. Numerous other factors are more important, not the least of which is union lethargy and an inability to devise effective organizational techniques—a phenomenon that has triggered the split of a number of the four largest unions away from the AFL-CIO into

25. PR Newswire, John Truesdale Continues as NLRB Chairman Following Unanimous Senate Confirmation, <http://www.highbeam.com/doc/1G1-57764852.html> (last visited Feb. 26, 2007).

26. See GOULD, LABORED RELATIONS, *supra* note 2, at 73, 157–59, 162–63, 169–71, 177, 179–80, 183, 190–91, 203, 220, 232, 247. Fortunately, all except Boehner have departed from Congress!

27. See *infra* Part II.

28. See *infra* Part I.B.

29. See William B. Gould IV, *Mistaken Opposition to the N.L.R.B.*, N.Y. TIMES, June 20, 1985, at A27; see also *The Limits of Solidarity*, ECONOMIST, Sept. 21, 2006, at 34–35. However, in my view the authors have taken this analysis at least one step too far in arguing for the irrelevance of unions and their concededly limited role in redistribution. See RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984).

a new Change to Win coalition.³⁰ And the infrequent ability or willingness of unions to use employment law—often decried as a barrier to union organization—is a relevant factor as well.³¹ It is another illustration of union lethargy.

Beyond the problems inside the unions themselves, there are other important factors. For instance, in the 1970s, foreign competition—at that time principally from Japan and Europe—decimated the manufacturing strongholds of the labor movement like automobile, electrical equipment, and other manufacturing elements. Then the emergence of free trade agreements, beginning with the North American Free Trade Agreement (NAFTA), meant increased capital mobility for employers with union relationships to countries like Mexico and China and the other new frontiers of the world economy. These agreements also helped promote outsourcing to countries from industries as disparate as telephone and health care to countries such as English-speaking India. Deregulation of transportation industries like railroads, airlines, and trucking meant new inroads in all of these industries made by nonunion employers and downward pressure upon the other union strongholds to make concessions in what was left.

The employment relationship itself has changed, and again, the law, while not the primary factor, has played a role that is arguably more than peripheral. Here I refer to what Audrey Freeman of the Conference Board³² characterized as contingent employees: part-timers, temporary workers, and independent contractors³³ who are beyond the statute's reach. I struggled mightily and unsuccessfully to issue contingent worker cases when I was at the Board. Through the 1990s, the Board had operated under the false assumption that employers, like Manpower, are part of a multi-employer bargaining association with those employers to whom they refer or supply

30. For an extremely critical discussion of these developments, see Samuel Estreicher, *Disunity Within the House of Labor: Change to Win or to Stay the Course?*, 27 J. LAB. RES. 505 (2006).

31. The Clinton Board's decision eliminating prior obstacles to the use of employment law in union organizational campaigns, *52nd St. Hotel Assocs.*, 321 N.L.R.B. 624 (1996), has gone unused and is now apparently unenforced. See *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999). Similarly, my California State Bar committee assumed that unions would use wrongful discharge litigation as a vehicle to recruit new members:

Similarly, there is much in our proposals for the unions as well. Traditionally, unions have opposed such proposals or been ambivalent with regard to them, because one of the prime benefits associated with organizing into a trade union and being covered by a collective bargaining agreement has been a just cause provision which protects employee job security. If the union is not able to offer the employee this benefit, so runs the argument, it will be deprived of a major selling point in its recruitment efforts and an incentive for the employees to join the union. We are not sure that this is the case . . .

AD HOC COMM. ON TERMINATION AT WILL AND WRONGFUL DISCHARGE, STATE BAR OF CALIFORNIA, TO STRIKE A NEW BALANCE (1984) (on file with the *Indiana Law Journal*); see also Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57 (2002).

32. Anne E. Polivka & Thomas Nardone, *On the Definition of "Contingent Work"*, MONTHLY LAB. REV., Dec. 1989, at 9, 9–10.

33. Independent contractors, like supervisors, are excluded from statutory coverage.

workers—thus making consent a prerequisite for statutory coverage,³⁴ as it is in genuine multi-employer associations where competitors are allowed to combine on labor matters and where no one will provide consent unless they perceive it to be within their self-interest. Consent by all parties is a prerequisite. In the Manpower scenario, there is no combination of competitive employers that band together to present a bargaining stance, but rather a business relationship between supplier and user. Surprise, surprise—consent is never provided by the employers in question, just as it is not supplied by any employer who does not engage in voluntary recognition! Congress requires consent through the Taft-Hartley amendments where employers will combine so as to take labor costs out of competition between competitors. This interest in controlling labor costs is the incentive for consent. But there is no comparable incentive for suppliers and users to provide consent.

Regrettably, the unwillingness of the Board to issue this and other major policy decisions in the 1997–98 period deprived the Agency of the ability to enforce such orders in the courts before the Bush II Board came into existence. When the Bush II Board arrived they were more easily able to reverse precedent without the contrary judicial precedent that might have emerged in 1999–2000 and 2001.³⁵

Then there is the matter of undocumented workers. The origin of this problem is hardly labor law, though immigration law has failed to effectively address the insatiable appetite of business for low-wage workers, especially in the case of those who are here illegally and are thus fearful to protest employment conditions. In 1984, the United States Supreme Court held that such workers are employees within the meaning of the Act and thus are entitled to its protection when engaging in concerted activity.³⁶ My Board held that such workers were entitled to back pay (though obviously not reinstatement because of their illegal status) when they were victims of employer violations of the Act.³⁷ But in 2002, the Supreme Court made short work of this holding and distinguished it,³⁸ by concluding in a 5–4 vote that such workers have no entitlement to back pay on the ground that such a remedy would provide a magnet for workers to come here unlawfully.³⁹

34. See *NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87, 94–96 (1957).

35. See *M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000), *overruled by* H.S. Care L.L.C., 343 N.L.R.B. 659 (2004).

36. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

37. *A.P.R.A Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408 (1995), *aff'd*, 134 F.3d 50 (2d. Cir. 1997), *abrogated by* *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (on the issue of back pay).

38. *Hoffman*, 535 U.S. at 152. Chief Justice Rehnquist, writing for the majority, distinguished the 1984 ruling by claiming that a remedy providing for a posted cease-and-desist order was still available, and thus the employees could avail themselves of it. However, in my view, the cease-and-desist order is essentially meaningless.

39. Chief Justice Rehnquist stated that “Indeed, awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations.” *Hoffman*, 535 U.S. at 150. In speeches given in Mexico, China, and the United States, I have often noted that Mexican and Chinese workers are hardly interested in the attractiveness of NLRB remedies or the composition of the Board itself in determining whether they will try to come to the United States unlawfully. It is possible that backpay is still available where, in contrast to *Hoffman*, (1) the employer knowingly violates immigration law; and (2) the

Another extremely important characteristic relates to the shift of jobs in the United States from the manufacturing sector to the service sector. Employers have fiercely resisted unions here, notwithstanding the effectiveness of such labor organizations as the Service Employees International Union (SEIU),⁴⁰ because of their inability to absorb increased labor costs through technological innovation, thus leaving them with the equally unappetizing choices of diminished profits or increased costs for the public.

Thus the factors responsible for union decline are numerous.⁴¹ Nevertheless, though the law can hardly explain 7.4 percent trade-union membership in the private sector,⁴² it is one factor—and it is important to have a law that effectively implements the policies and purposes of the Act.

The problems with the Act and the Board can be broken down into two parts. The first is the mischief that has been created by the Bush II Board through its doctrinal development, some of which involves the reversal of precedent. I think that it is appropriate under some circumstances to reverse precedent—particularly of an agency whose numbers are appointed by new presidents.⁴³ The reversal of precedents is properly anticipated by a statute which provides for short-term appointments. At the same time, I think that the arguments advanced by some management labor lawyers about the number of precedents reversed by each Board and the number of *years* of precedent involved⁴⁴ are beside the point—especially given the fact that Republicans have controlled most Boards for the past quarter century. The Bush II Board has pushed matters to one end of the continuum. The tilt on the seesaw⁴⁵ has become the topsy-turvy process of an upside-down Ferris wheel.

Bruce Raynor, president of the Union of Needletrades, Industrial, and Textile Employees (UNITE), was a great supporter of NLRB jurisdiction in the 1990s and

employee is not given a reasonable period of time to present valid immigration papers for conditional reinstatement, as my Board required in *A.P.R.A. Mezonos Maven Bakery, Inc.*, Case No. 29-CA-25476 (administrative law supplemental decision, Nov. 1, 2006). As with the Clinton board, Congress will be sure to express an interest in this. GOULD, LABORED RELATIONS, *supra* note 2, at 210-11.

40. See Matt Bai, *The New Boss*, N.Y. TIMES, Jan. 30, 2005, § 6 (Magazine), at 38.

41. See *supra* note 14 and accompanying text.

42. *Id.*

43. As I stated to Senator Hatch at my confirmation hearings,

I believe that there is a presumption in favor of stability. As you know, there have been shifts in doctrines by previous boards, both boards appointed by Democratic as well as by Republican Presidents. I believe in a presumption in favor of stability, and should the Board reverse what it has done previously, it should have substantial reasons for doing so.

Gould Hearings, *supra* note 12, at 23–24 (testimony of Professor William B. Gould IV).

44. E.g., JOHN S. IRVING, AMERICAN BAR ASSOCIATION SECTION OF LABOR AND EMPLOYMENT LAW, “WE’RE OFF TO SEE THE WIZARDS”: A PANEL DISCUSSION ON THE BUSH BOARD’S DECISIONS (2006), <http://www.fed-soc.org/Publications/practicegroupnewsletters/labour&employment/Bush%20Board%20Remarks021606.pdf>; G. ROGER KING, AMERICAN BAR ASSOCIATION SECTION OF LABOR AND EMPLOYMENT LAW, “WE’RE OFF TO SEE THE WIZARDS”: A PANEL DISCUSSION ON THE BUSH II BOARD’S DECISIONS . . . AND THE YELLOW BRICK ROAD BACK TO THE RECORD OF THE CLINTON BOARD (2006), <http://www.bna.com/bnabooks/ababna/nlra/2006/king.pdf>.

45. Bernard D. Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw*, 30 U. CHI. L. REV. 78 (1962) (providing inspiration for the use of this word here).

regarded the NLRB certification process as constituting the only game in town. But illustrative of his disillusionment is the *Goya Foods*⁴⁶ decision. In that case, the union won an election in 1998, union leaders were dismissed in 1999, and the union ultimately obtained reinstatement in 2006.⁴⁷ Now UNITE never uses the Board but promotes “voluntary” neutrality agreements with employers as a vehicle to organize the unorganized.

The second problem with the law is the most important of all and one that gets relatively little attention: the way in which the Bush II Board has functioned in connection with its actual case-processing record, with particular comparison to the Clinton Board and what went before it.

What then can be done about any of this? In addressing this issue, I refer to a number of recent NLRB decisions, which contradict the Act’s policies. It is this matter to which I now direct my attention.

I. THE MISCHIEF OF THE BUSH II BOARD

A. Denial of Jurisdiction

One of the more remarkable of the Bush II Board’s decisions is *Brevard Achievement Center, Inc.*,⁴⁸ where the Board held that disabled workers, performing the same janitorial work as nondisabled workers, were not employees within the meaning of the Act. All of the workers, disabled and nondisabled, had been engaged by the contractor providing janitorial services to the Cape Canaveral Air Station to perform the same hours and tasks for the same wages. When the workers, both disabled and nondisabled, petitioned for representation, the Board held that the disabled workers were not employees within the meaning of the Act and therefore could not avail themselves of the representation machinery in the statute. The Board’s theory was that the workers’ relationship with the employer was essentially rehabilitative rather than economic and thus did not constitute an employment relationship within the meaning of the Act.

This decision is most certainly high on the list of the more ludicrous of the Bush II Board’s decisions and contrary to our coverage (after being prodded by the Court of Appeals for the District of Columbia⁴⁹) of so-called free world workers who, as part of their rehabilitation, left prison to work in private employment during the day. This is hardly consistent with the United States’s attempt to bring the disabled into the mainstream of the employment relationship, as manifested by the Americans with Disabilities Act of 1990.⁵⁰

A similar approach was undertaken in *Brown University*,⁵¹ where the Board held that graduate teaching assistants were not employees within the meaning of the Act

46. 347 N.L.R.B. No. 103, 2006 WL 2540668 (Aug. 30, 2006).

47. *Id.* at *7.

48. 342 N.L.R.B. 982 (2004).

49. *Speedrack Prods. Group, Ltd. v. NLRB*, 114 F.3d 1276, 1282 (D.C. Cir. 1997) (adopting and extensively quoting my dissent in the NLRB decision), *rev’g* 320 N.L.R.B. 627 (1995).

50. 42 U.S.C. §§ 12101–12213 (2000).

51. 342 N.L.R.B. 483 (2004).

because they were students rather than employees. Therefore, although many such employees had organized unions due to both Board precedent⁵² and, in public universities, under public sector labor legislation,⁵³ they were read out of the Act through reasoning that would logically deprive all employees in private universities—and perhaps those outside of higher education as well—of collective bargaining.⁵⁴ As noted above, the pity is that this decision, like others—particularly those involving contingent employees for whom statutory coverage was also denied by the Bush II Board⁵⁵—might have survived more easily had my Board taken prompt action in the mid-1990s allowing for circuit court approval in the interim. Had the circuit courts possessed enough time to enforce the Board's order, a subsequent departure from stare decisis would have been more difficult for the Bush II Board to justify.

The *New York University* decision that *Brown University* reversed was one about which I stated in my book, *Labored Relations*, that at the present rate of disposition the Board would take three or four years to decide. Once my successors saw the page proofs prior to publication in late 1999, the decision issued almost immediately! Notwithstanding the fact that, by the good graces of Senator Lott, we had a full Board from 1997 onward, no decision on this and other major issues could issue and the way was thus open for a quick Bush II reversal. This was one of the great opportunities lost in the 1990s. I discuss the reasons for this prevarication below, as well as some steps that might be taken to alter this in the future.

B. Statutory Coverage: The Supervisory Status of Nurses and Charge Nurses

Thus far, the greatest amount of attention with respect to the Bush II Board has been given to a group of cases involving the question of whether charge nurses and registered nurses, generally employed in hospitals, are supervisors or employees within the meaning of the Act. These cases also consider whether supervisory standards ought to be changed generally. The lead case, *Oakwood Healthcare, Inc.*,⁵⁶ addressed the interpretation to be given to section 2(11) of the Act,⁵⁷ which defines "supervisor" as

52. See *N.Y. Univ.*, 332 N.L.R.B. 1205 (2000), *overruled by* *Brown Univ.*, 342 N.L.R.B. 483 (2004).

53. This legislation is referenced in the debate between the majority and the dissenters in *Brown Univ.*, 342 N.L.R.B. at 492–93, 499–500.

54. The Board stated:

The rationale . . . is a relatively simple and straightforward one. Since the individuals are rendering services which are directly related to—and indeed constitute an integral part of—their educational program, they are serving primarily as students and not primarily as employees. In our view this is a very fundamental distinction for it means that the mutual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature. Such interests are completely foreign to the normal employment relationship and, in our judgment, are not readily adaptable to the collective-bargaining process.

Brown Univ., 342 N.L.R.B. at 489 (quoting *St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. 1000, 1002 (1977)).

55. *H.S. Care L.L.C.*, 343 N.L.R.B. 659 (2004).

56. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37 (Sept. 29, 2006).

57. 29 U.S.C. § 152(11) (2006).

any individual having the authority, in the interest of the employer, to . . . assign, . . . or responsibly to direct [other employees], . . . or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.⁵⁸

Here registered nurses directed less skilled employees to perform tasks such as “feeding, bathing, and walking patients” as well as other tasks “ordered by doctors for their patients.”⁵⁹ So-called charge nurses could assign other registered nurses and licensed practical nurses, nursing assistants, technicians, and paramedics to patients on their shifts.

The backdrop for *Oakwood Healthcare* was the Supreme Court’s decision in *NLRB v. Kentucky River Community Care, Inc.*,⁶⁰ authored by one of the Court’s most conservative Justices: Antonin Scalia. In this case, the Court rejected the Board’s previous exemption of “professional employees,” who are explicitly covered by the Act,⁶¹ from the consequences of exercising supervisory functions. The Board’s view was predicated on the reality that most professional employees have supervisory responsibility, and therefore a broad definition of supervisor would eliminate the grant of employee rights to professionals. Though Justice Scalia’s majority opinion rejected the Board’s view, the Court, albeit in dicta, suggested the possibility that the position taken by my Board in 1996⁶²—to the effect that supervisory exclusion did not apply to individuals supervising *discrete tasks* as opposed to *employees*—might be a permissible one. This approach, of course, was virtually ignored by the Bush II Board. The Board said,

[W]e construe the term “assign” to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. . . . In the health care setting, the term “assign” encompasses the charge nurses’ responsibility to assign nurses and aides to particular patients. It follows that the decision or effective recommendation to affect one of these—place, time, or overall tasks—can be a supervisory function.⁶³

On the question of how to interpret the language “responsibly to direct,” the Board again said:

58. *Id.*

59. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37, at 2.

60. *NLRB v. Ky. River Cmty. Care*, 532 U.S. 706 (2001).

61. 29 U.S.C. § 159(b) (2006).

62. Scalia stated:

Perhaps the Board could offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others’ performance of discrete *tasks* from employees who direct other *employees*, as § 152(11) requires. Certain of the Board’s decisions appear to have drawn that distinction in the past, see, e.g., *Providence Hospital*, 320 N.L.R.B. 717, 729 (1996).

Kentucky River, 532 U.S. at 720 (emphasis in original).

63. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37 at 4.

[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action . . . [and] that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.⁶⁴

On the critical issue of “independent judgment,” where the Board had failed in *Kentucky River* to convince the majority of the Court that professionals should be viewed differently, the Board noted that it must take into account “the *degree* of discretion exercised.”⁶⁵ Here the devil will be in the details; management labor lawyers are already advising their clients about the standards established by the Board and how employer guidelines can put them on the supervisory side of the equation.⁶⁶

One important question arising out of *Oakwood Healthcare* is the question of whether the Board’s reasoning will be applied to construction and manufacturing. In a companion case,⁶⁷ the Board held that lead men in a manufacturing establishment were not supervisors because they did not meet the *Oakwood Healthcare* definition of “assigned,” that is, they did not “prepare the posted work schedules for employees, appoint employees to the production lines, departments, shifts, or any overtime periods, or give significant overall duties to employees.”⁶⁸ That this case was argued alongside the health care cases suggests that the Board will apply an expansive supervisory standard outside of health care as well, though the actual results in all areas await future litigation.

C. Avenues of Communication

In one of the early cases involving the Act, the Supreme Court held that employees may engage in union activity on company property, including solicitation and distribution of literature during nonworking time.⁶⁹ In 1992, a divided Court excluded nonemployee union organizers from company property for the most part.⁷⁰ Then new issues began to arise involving a variety of kinds of conduct in the workplace.

The first of these cases, *Lafayette Park Hotel*,⁷¹ involved a wide variety of work rules that the Board approved the bulk of by a three-to-two vote in which I joined with the Republicans on most of the rules and the Democrats on a minority of them. In my concurring opinion, I joined with the Republican members, forming a majority to hold that the following work rules were lawful in the absence of evidence that they were instituted for anti-union discriminatory reasons:⁷²

64. *Id.* at 7.

65. *Id.* at 8 (emphasis in original).

66. See, e.g., *AFL-CIO’s Complaint to Be Filed with the International Labor Organization*, Daily Lab. Rep. (BNA) No. 204, at E-8 (Oct. 23, 2006).

67. *Croft Metals, Inc.*, 348 N.L.R.B. No. 38 (Sept. 29, 2006).

68. *Id.* at 5.

69. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); see also *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962).

70. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

71. 326 N.L.R.B. 824, 829–30 (1998) (Gould, Chairman, concurring).

72. *Id.* at 829.

- (1) rules condemning “uncooperative” behavior that did not support a hotel’s “goals and objectives”;⁷³
- (2) rules condemning divulging information to individuals “not authorized to receive that information”;⁷⁴
- (3) a prohibition against “[u]nlawful or improper conduct off the hotel’s premises or during non-working hours which affects the employee’s relationship with the job, fellow employees, supervisors, or the hotel’s reputation or goodwill in the community”;⁷⁵
- (4) a prohibition against use of “the restaurant or cocktail lounge for entertaining friends or guests without the approval of the department manager”;⁷⁶
- (5) a prohibition against “fraterniz[ing] with hotel guests anywhere on hotel property.”⁷⁷

I viewed the dissent of my Democratic colleagues as having “completely lost sight of the most obvious meaning and intent of these rules: the maintenance of civility and good manners.”⁷⁸ I said that “these are rules for life, not for section 7 conduct.”⁷⁹ I subscribed to the view that work rules do not have to be devised to take into account sophisticated union-labor-lawyer parsing of the language.

Now, however, the Bush II Board has taken quantum leaps beyond this case in other areas as well. *Guardsmark*⁸⁰ demonstrates that, given the limitations relating to union activity on company property, the prohibition against fraternization away from the job constitutes a serious impediment to section 7 organizational activity. Unlike the rules involved in *Lafayette Hotel*, union activity was directly implicated by the antifraternization rules that were in question in *Guardsmark*. Moreover, in many instances no evidence is introduced to show that overly broad no-solicitation rules relating to employee activity on company property were instituted with a particular purpose in mind; the underlying theory seems to be that the workplace is critical to union organizing.

Indeed, the Supreme Court, in protecting employee solicitation on company property, has stressed the importance and centrality of the workplace as a forum in which to recruit.⁸¹ Now, with access of nonemployee organizers and company property all the more circumscribed, it would seem that employee activity away from company property is more necessary than ever. Indeed, the union halls and other facilities have always been important to employees engaged in organizational campaigns. And those

73. *Id.* at 825.

74. *Id.* at 826.

75. *Id.* at 826–27.

76. *Id.* at 827.

77. *Id.* I voted with the majority also to condemn as unlawful a prohibition against “false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees,” as well a requirement that employees leave company property immediately after their completion of the shift. *Id.* at 828.

78. *Id.* at 829.

79. *Id.*

80. *Guardsmark*, L.L.C., 344 N.L.R.B. No. 97 (June 7, 2005), *enforced in part and enforcement denied in part by* *Guardsmark*, L.L.C. v. NLRB, 475 F.3d 369 (D.C. Cir. 2007).

81. See *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974).

cases that have emphasized the importance of union resort to so-called alternate avenues of communication have assumed that there would be contact outside the workplace!⁸² But the Bush II Board's decision in *Guardsmark* seems to place such activity beyond statutory protection.

D. The Bargaining Process

One particularly troubling Bush II Board case involves the Supreme Court's standards as adumbrated in *NLRB v. Truitt Manufacturing Co.*,⁸³ where the Court held that an employer has a duty to disclose and to open its books when it claims an inability to pay. In a case before the Board,⁸⁴ the employer, in stating that it was required to discontinue its 401(k) fund matching and meals and would be unable to provide a meaningful wage increase, said, "Things are tough."⁸⁵ The union representative asked, "[A]re you saying you cannot afford the Union's proposals?"⁸⁶ The employer replied, "No, I can't. I'd go broke."⁸⁷

When the union demanded access to review the company's books, the company sent a letter that contradicted its statement that it could not afford the proposals but said that it needed to take a more "cautious approach" in these "uncertain economic times."⁸⁸ But when the parties met again, after the company had sent the letter, the union asked if business was really that bad. The company representative responded, "Have you seen sales lately[?]"⁸⁹ In another exchange, the company denied that it had used the words to the effect that it would "go broke" under union demands.⁹⁰

The administrative law judge found at the trial stage that the company had violated its duty-to-bargain obligation under *Truitt* inasmuch as it was still stating that things were "tough" and that it had subsequently instituted an economic layoff of most of the bargaining-unit employees. The Board reversed, stating that the company had not claimed an inability to pay.⁹¹ The Ninth Circuit unanimously reversed the Board's decision. The court held that the Board had "too quickly" rejected the company's "I'd go broke" statement and stated that the Board's analysis failed to take into account the company's other statements during the negotiations.⁹² The court said that clear statements of a company's inability to pay cannot be cast aside as abruptly as the Board did here. The court said, "The Company's statements of inability to pay, i.e., 'No I can't. I'd go broke,' coupled with its refusal to substantiate, strongly, but do not

82. See, e.g., *NLRB v. United Aircraft Corp.*, 324 F.2d 128 (2nd Cir. 1963).

83. *NLRB v. Truitt Mfg.*, 351 U.S. 149 (1956).

84. *Am. Polystyrene Corp.*, 341 N.L.R.B. 508 (2004).

85. *Id.* at 513.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 509.

91. *Id.* at 508.

92. *Int'l Chem. Workers Union Council v. NLRB*, 447 F.3d 1153, 1160 (9th Cir. 2006), rev'g *Am. Polystyrene Corp.*, 341 N.L.R.B. 508 (2004).

conclusively, suggest that the [C]ompany bargained in bad faith, regardless of whether the statement was made during heated negotiations.”⁹³

The court also relied upon the fact that employer conduct in the form of layoffs and proposed reduced benefits was conduct of a company which “could not sustain itself if forced to pay for the Union’s proposals.”⁹⁴ The court quite properly, in my view, rejected attempts to engage in semantic games as a vehicle to evade one’s statutory bargaining obligations in negotiations. In so doing, it cast aside the selective and blinkered view of the facts provided by the Bush II Board.

II. THE BOARD’S PRODUCTION AND LAW ENFORCEMENT PERFORMANCE

An additional problem is the way in which the Bush II Board processes cases. The most remarkable aspects of the Board’s behavior during these past few years relate to its handling and production of cases and its unwillingness to engage in its law enforcement mission by seeking injunctive relief where the standards are met. This was a matter in which both Bill Stewart and I were deeply involved.

Case management, rapid processing, and the use of the one tool that the Board has at its disposal for adequate law enforcement—section 10(j) of the National Labor Relations Act⁹⁵—have always been a problem. When I was Chairman, the caseload had diminished from the halcyon days of the Board and the Act when Bill Stewart and I were young attorneys in the 1960s and when the case intake for the agency was in excess of 40,000 unfair labor practices and representation proceedings. In the 1990s, the caseload began to decrease slowly, and this was deemed to be attributable to a number of factors: (1) lost confidence in the Board from the Reagan 1980s; (2) a decline in union organizing activity and union organizational energy—later manifested by the two challenges to AFL-CIO leadership in 1995 and 2005; and (3) a growing sense that the Board’s administrative processes were excessively cumbersome and exploitable and that the remedies were inadequate, notwithstanding the fact that this had begun to dawn on those involved in labor-management relations from the 1970s onward.

Now with the Bush II Board, the agency intake is significantly lower than what it was in the 1990s, constituting approximately 26,000 cases.⁹⁶ This has meant that the regions have a considerably diminished burden. The regions and the administrative law judges have functioned most effectively since the early- and mid-1990s. Historically, most cases have been settled and/or conciliated at the regional level, and only a small minority of cases have come to the Board in Washington. I thought that the Board should focus on stages of litigation where settlements were not generally obtained. Therefore, special settlement procedures were devised, which the administrative law judges could perform given our recognition that this was the weak link in the settlement process. During my chairmanship, we always had slightly more than 1000

93. *Id.* at 1161.

94. *Id.* at 1162.

95. 29 U.S.C. § 160(j) (2006).

96. See *infra* Table 1. “Unfair labor practice case intake was 23,080, a 6.7% decrease from the FY 2005 intake of 24,726. Representation case intake was 3,643, a 25.6% decrease of over the FY 2005 intake of 4,894.” *NLRB General Counsel’s Report on FY 2006 Operations, Memorandum GC 07-03 January 3, 2007*, Daily Lab. Rep. (BNA) No. 3, at E-1 (Jan. 5, 2007).

cases, except for fiscal year 1996, when we had 997 cases. During this period of time, we were able to bring the backlog to its lowest level that the Board has ever known since records were first kept in the early 1970s—approximately 330 cases in 1995.

Table 1. NLRB Case Statistics.

| | Clinton Board | | | | | Bush II Board | | | |
|--------------------------------------|---------------|-------|-------|-------|-------|---------------|-------|-------|-------|
| | 1994 | 1995 | 1996 | 1997 | 1998 | 2003 | 2004 | 2005 | 2006 |
| Case Intake | 40861 | 39935 | 38775 | 39618 | 36657 | 33715 | 31787 | 29858 | 26717 |
| ULP (Case Age in Days) | 758 | 893 | 846 | 929 | 985 | 1030 | 1159 | 1232 | — |
| Representation (Case Age in Days) | 152 | 305 | 369 | 370 | 473 | 473 | 576 | 802 | — |
| Section 10(j) | 83 | 104 | 53 | 53 | 45 | 17 | 14 | 15 | 25 |
| ALJ Bench Decisions | — | 10 | 20 | 28 | 56 | 24 | 14 | 15 | 11 |

Table 2. Washington Board Statistics.

| | Clinton Board | | | | | Bush II Board | | | |
|--------------|---------------|------|------|------|------|---------------|------|------|------|
| | 1994 | 1995 | 1996 | 1997 | 1998 | 2003 | 2004 | 2005 | 2006 |
| Case Intake | 1155 | 1138 | 997 | 1084 | 1083 | 818 | 754 | 562 | 448 |
| Cases Issued | 717 | 935 | 709 | 873 | 708 | 543 | 576 | 508 | 386 |
| Case Backlog | 585 | 459 | 495 | 672 | 771 | 673 | 636 | 544 | 364 |

During this period of fairly substantial intake we were issuing cases in a reasonably effective manner. The statistics were rather low when we only issued 708 decisions as problems began to emerge in the 1997–98 period. The production reached its zenith in 1995 and 1997 when the comparable figures were 935 and 873, respectively.

Today, however, the Bush II Board is positively indolent. Not only has the case intake for the agency gone down substantially, but the same is true of Washington intake; indeed, during the past two fiscal years the figures were 562 and 448. But with a far more manageable caseload attributable to an increased loss of confidence in the Board, production has gone down to 386 cases.

In other words, with a lessened caseload and a backlog that is roughly comparable to our early years, case production has been substantially less than half of what it was in the 1990s. What is particularly revealing is a comparison of the age of cases pending at the end of the fiscal year. Again, with a greater caseload, the median age of unfair labor cases was 758 days in 1994; for representation cases, the median age was 152 days in 1994. Later, in 1997, our comparable days were 929 and 473 for unfair labor practice proceedings and representation proceedings, respectively. This was at a time when the Board was functioning with three members, only one of them confirmed. Today the comparable figures for a five-member board, operating at full strength, are 1232 days and 802 days, respectively.

Recall that our problems of obtaining confirmation of Board members in the 1990s were enormous. Until Senator Lott allowed new members in 1997, the Board had endured three years of no confirmed appointees and no new Board members. The Board was often at less than full strength and had to serve with recess appointments,

rather than confirmed members. Indeed, at one point in 1997, I was the only confirmed member of the Board.

For the past three years, the Board has lamented its inability to produce and has explained it in terms of not being at full strength. But for all of 2006, the Board *was* at full strength with five members, and its case production actually declined to an all-time low from previous years when it was at less than full strength.

Table 3. Clinton Board.

| 1994 | | 1995 | | 1996 | |
|---|--------------------|--|--------------------|----------------------------|--------------------|
| <i>Confirmed</i> | <i>Unconfirmed</i> | <i>Confirmed</i> | <i>Unconfirmed</i> | <i>Confirmed</i> | <i>Unconfirmed</i> |
| Devaney Gould Browning Stephens Cohen | — | Stephens Gould Cohen Browning | Truesdale | Gould Browning Cohen | Fox |

| 1997 | | 1998 | |
|------------------|--------------------|---|--------------------|
| <i>Confirmed</i> | <i>Unconfirmed</i> | <i>Confirmed</i> | <i>Unconfirmed</i> |
| Gould | Fox Higgins | Gould Fox Brame Hurtgen Liebman | — |

Table 4. Bush II Board.

| 2002 | | 2003 | | 2004 | |
|------------------|------------------------------|---|--------------------|---|--------------------|
| <i>Confirmed</i> | <i>Unconfirmed</i> | <i>Confirmed</i> | <i>Unconfirmed</i> | <i>Confirmed</i> | <i>Unconfirmed</i> |
| Liebman | Hurtgen Bartlett Cowen | Acosta Battista Schaumber Walsh Liebman | — | Battista Schaumber Walsh Liebman | Meisburg |

| 2005 | | 2006 | |
|----------------------------------|--------------------|---------------------|--------------------------------|
| <i>Confirmed</i> | <i>Unconfirmed</i> | <i>Confirmed</i> | <i>Unconfirmed</i> |
| Battista Schaumber Liebman | — | Battista Liebman | Schaumber Kirsanow Walsh |

What is the Board doing with its time? And what explains this sharp decline? In 1997 and in 1998, I complained bitterly about our lack of production. Our activity, however, was positively robust by today's standards. The Board in Washington was always the weak link in the administrative chain; in contrast, the administrative law judges and the regional directors performed expeditiously and effectively. I became increasingly vocal as my term was about to expire in 1998 and offended both colleagues and organizations like the Labor and Employment Section of the American Bar Association (ABA), whose functions I could not attend because of our need to produce (though my colleagues found time to attend all such conferences in faraway

places like Hawaii and Puerto Rico).⁹⁷ I faced a double-barreled problem: Republican appointees who had the blessing of the far right in the United States Senate and who, consequently, did not have a particular interest in producing promptly. These appointees issued lengthy opinions that verged on challenging the constitutionality—let alone the assumptions—of the National Labor Relations Act and hoped for a new Republican Administration, which they shortly got! This was the mirror image of a Republican Congress, which, as MacKenzie had observed, was opposed to the Act's principles. Ultimately, I came to the regrettable conclusion that Democratic members were unwilling to produce because they feared the hostility of the Republican Congress, which had manifested itself not only in the appointments and adjudication arena but also in the process of reappointment. I searched for alternate explanations, but none beyond unbridled lethargy were readily forthcoming.⁹⁸

It is a little difficult to grasp today's extensive inactivity, which is so large by the standards of the 1990s. After all, until recently, all three branches of government were controlled by the Republican Party. In part, the explanation may lie in the fact that the Republican Congress has had no interest in productivity. The level of interest in productivity may change as the new Democratic Congress takes up its oversight responsibilities in 2007. The same lack of interest in productivity was true of my chairmanship in the Gingrich 1990s, except, that is, for the *Beck* cases involving the right of dissident nonmembers to protest the expenditure of union dues for Democratic Party political activity.⁹⁹

97. Moreover, the fact that a substantial portion of Board members and General Counsel expenses were paid by the ABA Labor and Employment Law Section—composed of the very lawyers who appear before the NLRB—always seemed to me to raise ethical questions. In some respects, this is similar in kind to the problems in the federal judiciary, about which Judge Abner Mikva persistently complained when he “opposed allowing judges to accept free trips to resorts for seminars sponsored by private groups.” Adam Liptak, *Appeals Court Rejects Brief Submitted By Ex-Judges*, N.Y. TIMES, Dec. 30, 2006, at A15.

98. See Judge Noonan's opinion in *NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55 (2d Cir. 1999), where he said:

[T]he Board stands out as a federal administrative agency which has been rebuked before for what must strike anyone as a cavalier disdain for the hardships it is causing. We have on other occasions indicated that extraordinary delay of this kind will itself be reason to refuse to enforce an order of the Board. . . . Although we have no occasion in this case to apply this doctrine, we call it to the Board's attention as a reminder that, whatever its internal problems, the Board has a duty to act promptly in the discharge of its important functions.

Id. at 59 (citation omitted).

99. These cases arise by virtue of *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), in which the Court held that the payment of dues by nonmembers, required as a condition of employment, could not be compelled where union expenditures were not “germane” to collective bargaining functions. Jurisdiction is provided to both the NLRB and courts of general jurisdiction. My Board articulated the standards to apply to these so-called *Beck* cases in a series of seminal decisions, see, e.g., *California Saw & Knife Works*, 320 NLRB 224 (1995), *enforced sub. nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), *cert. denied sub nom. Strang v. NLRB*, 525 U.S. 813 (1998); *Weyerhaeuser Paper Co.* 320 NLRB 329 (1995), *rev'd on other grounds sub. nom. Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *vacated sub nom. United Paperworkers Intern. Union v. Buzenius*, 525 U.S. 979 (1998). These

It is not altogether surprising that the Board's section 10(j) activity mirrors the same trend—inactivity. During my chairmanship, we authorized 83 and 104 cases to go to federal district court in the first two years, respectively. The number declined to 53 in 1996 and 1997 and 45 in 1998 as the General Counsel requested fewer authorizations in the teeth of congressional hostility. But the Bush II Board has authorized 14, 17, 14, and 15 section 10(j) injunctions, and the number climbed back to 25 in 2006. The Clinton Board record—in contrast to that involving a case production that simply reflects lack of attention to the task at hand—is not surprising given the attacks that were made upon our Board in the 1990s for its use of section 10(j). Given the administrative and remedial problems alluded to above, section 10(j) is the only game in town and, in my view, was responsible for the revival of the agency in the 1990s. As the above-noted figures reflect, those days are long gone.

ALJ bench decisions—decisions issued from the bench or within seventy-two hours from the close of the hearing¹⁰⁰—were designed for a purpose similar to that of section 10(j): to expedite cases. The use of these procedures has diminished substantially, as well. While this reform does not involve Board discretion itself, it would seem as though the administrative law judges are taking an informal signal from the Board that this mechanism is not viewed as favorably as it was in the 1990s.

What is the Board doing with its time?¹⁰¹ And what can be done about it?¹⁰²

cases were the “third rail” for Republican members of the NLRB, principally because the National Right to Work Committee, whose inflammatory rhetoric saw them refer to my writings as a “liberal or union *Mein Kampf*”, GOULD, LABORED RELATIONS, *supra* note 2, at 22, insisted that dissent by nonmembers from union expenditures was to be presumed. Republican board members were in a quandary because the law as defined by the United States Supreme Court was to the contrary. But to recognize this was to incur the wrath of the politically influential (with the Republicans) National Right to Work Committee and thus risk, in the case of the Republican Chairman who preceded me, dismissal as Chairman. *Id.* at 129. Chairman Stephens advised me that he was “scared to death” that the White House would say to him, “You can kiss the chairmanship good-bye” if he did not subscribe to the National Right to Work Committee line. *Id.* “The Republicans always took an interest in the *Beck* cases, which were the exclusive focus of the National Right to Work Committee. But the Republicans, who saw union money being overwhelmingly bestowed upon the Democrats, did not need the Right to Work committee to remind them that it was in their own self-interest to pressure the Board about Beck. It was their vehicle, as they saw it, to break the financial connection between the unions and the Democratic party, thus weakening both groups.” *Id.* at 184. Accordingly, the Republican leadership attacked both me and Secretary of Labor Robert Reich during the 1996 elections as facilitating the expenditure of union funds for Democrats. *E.g., id.* at 220.

100. See *NLRB v. Beverly Enters.-Mass., Inc.*, 174 F.3d 13 (1st Cir. 1999); see generally Lamont Stallworth, Arup Varma & John T. Delaney, *The NLRB's Unfair Labor Practice Settlement Program: An Empirical Analysis of Participant Satisfaction*, DISP. RESOL. J., Nov. 2004–Jan. 2005, at 22.

101. This is not the first time that I have speculated about this, notwithstanding the fact that the record has grown much worse in the interim years. See William B. Gould IV, *The Labor Board's Ever Deepening Somnolence: Some Reflections of a Former Chairman*, 32 CREIGHTON L. REV. 1505 (1998–1999). I have previously examined the Bush II Board record on both case handling and law enforcement. See William B. Gould IV, *The NLRB at Age 70: Some Reflections on the Clinton Board and the Bush II Aftermath*, 26 BERKELEY J. EMP. & LAB. L. 309 (2005).

102. In one case, a writ of mandamus was successfully sought and obtained from the Court of Appeals for the District of Columbia mandating the Board to issue a decision pending with it

It seems that one immediate answer is to reduce the number of Board members to the number in place in pre-Taft-Hartley-amendment days before 1947—three rather than five. I frequently thought that this was an answer to my problems in the 1990s when so many indolent cooks stood around the soup as it became ever so cold. There are too many people with too many political agendas involved in the process. Five members can produce more prevarication in case resolution more easily than three members.

In the 1990s, I proposed that Board members have a longer term of office—seven or eight years—and be barred from obtaining reappointment. This would give Board members more experience on the job and allow the public to get a better return on its investment. This would also simultaneously insulate appointees who could focus on the work at hand, rather than preoccupy themselves with the reappointment process.¹⁰³ In that way, I thought that the very best people would come in for the very best reasons and that more independent people from diverse portions of the country would want to make a contribution. And then when their terms expired they would be pleased to return to the places of their origin in Cincinnatus-like fashion as they had in the era about which Professor MacKenzie wrote. If anything, perhaps the term should be longer; but the principle should remain the same. It may be that a labor court with full-fledged judges sitting for life tenure would be the best of all options, but yet that seems to be a bridge too far, given the lack of consensus on labor policy as reflected in the broad ambiguous language of the National Labor Relations Act.

Finally, a bit of sunshine inside the agency would help as well. When I was Chairman, a number of Board members—especially my successor as Chairman—did not even want to release information about the vote in section 10(j) cases and only relented when I was public about my position. Now, section 10(j) authorization information is provided as a matter of course even by the Bush II Board. The same should be done for processing of cases. The old cases that languish in the Board's processes can be identified in terms of which Board member has refused to sign off on them. Perhaps this would induce the malingerers to function more expeditiously and to meet the very minimal standards in terms of the actual production of and issuance of decisions by the Board. And, if their political allies gave laud and honor to inaction, at least this waste of taxpayer dollars would be more naked for all to see! Perhaps vigilant oversight by Congress in 2007 can address these matters effectively. Whether it does or not, policies promoting a newfound union interest in self-help initiatives will be important. For only through a genuine trade union resurgence can the relentless decline of labor be reversed. It is to this subject that we now turn.

for seventeen years within a twelve-day time period. *In re Pirlott*, 2007 U.S. App. LEXIS 1352 (D.C. Cir. Jan. 18, 2007). The Board obeyed. *Scheiber Foods*, 349 N.L.R.B. No. 14 (Jan. 26, 2007). The difficulty here is that few parties will dare offend the decision maker—in this case, the NLRB—through such embarrassment. Here, however, the National Right to Work Committee dared risk the Board's ire because of the low regard in which the Committee is held by many elements inside the Board.

103. Admittedly, longer terms would be frustrating to a new Congress or, more importantly, to a new Administration. But I think that these problems, however, are less vexatious than those that I have addressed in this Article. I have long argued for a depoliticization of the Board. This is needed today more than ever. See, for instance, my proposals on rulemaking, which encountered considerable opposition from Congress and, indeed, were subject to appropriations riders prohibiting them. GOULD, LABORED RELATIONS, *supra* note 2, at 69–74.

III. WHERE DO WE GO FROM HERE?

A. Neutrality Agreements and Other Forms of Self-Help

The question of alternatives to National Labor Relations Act procedures administered by the Board was discussed as much as a decade ago, when I was Chairman. My position then¹⁰⁴ and now was and is that the existence of voluntary procedures as an alternative to litigation is always desirable—just as is the case with grievance-arbitration machinery and the public policy enshrined in Supreme Court jurisprudence supporting that institution.¹⁰⁵ The opinions of the Second, Sixth, and Ninth Circuits,¹⁰⁶ as well as the Board,¹⁰⁷ acknowledge that voluntary recognition is an important part of national labor policy.

The Supreme Court has said that alternate procedures such as union authorization cards can be a basis for recognition with majority support, even though this is not a statutory mandate, as it was in the pre-Taft-Hartley era.¹⁰⁸ Resort to such procedures on a voluntary basis has frequently meant the negotiation of so-called neutrality agreements, which contain a number of characteristics.¹⁰⁹

104. See *Smith's Food & Drug Ctrs., Inc.*, 320 N.L.R.B. 844, 847–48 (1996) (Gould, Chairman, concurring); *Douglas-Randall, Inc.*, 320 N.L.R.B. 431 (1995). I have articulated this position in the press as well: “‘[I]f a union can obtain recognition without going to us, they will always be better off,’ [Gould] said. ‘There is more delay going through us.’” Frank Swoboda, *To the AFL-CIO, There's No Place Like Home; Unions Increasingly Turn to Door-to-Door Organizing, Bypassing Employer Opposition*, WASH. POST, Mar. 16, 1997, at H01.

105. See *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609 (2006).

106. See *SEIU v. St. Vincent Med. Ctr.*, 344 F.3d 977 (9th Cir. 2003); *N.Y. Health & Human Serv. Union, 1199 v. NYU Hosps. Ctr.*, 343 F.3d 117 (2d Cir. 2003); *UAW v. Dana Corp.*, 278 F.3d 548 (6th Cir. 2002); *Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993); *Hotel Employees, Rest. Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464 (9th Cir. 1992).

107. See *Verizon Info. Sys.*, 335 N.L.R.B. 558 (2001) (dismissing a petition for election because of a pending arbitration over the scope of the bargaining unit); *New Otani Hotel & Garden*, 331 N.L.R.B. 1078 (2000). The Board has held that an agreement that requires an employer to have relationships with companies that they may acquire, which includes card check recognition and interest arbitration, is lawful. See, e.g., *Heartland Indus. Partners, L.L.C.*, 348 N.L.R.B. No. 72 (Nov. 7, 2006).

108. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *United Mine Workers v. Ark. Oak Flooring Co.*, 351 U.S. 62 (1956).

109. See generally James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005); Charles I. Cohen, Joseph E. Santucci, Jr. & Jonathan C. Fritts, *Resisting Its Own Obsolescence—How the National Labor Relations Board is Questioning the Existing Law of Neutrality Agreements*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 521 (2006); Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42 (2001); Andrew M. Kramer, Lee E. Miller & Leonard Bierman, *Neutrality Agreements: The New Frontier in Labor Relations—Fair Play or Foul?*, 23 B.C. L. REV. 39 (1981); Jim Pope, *Next Wave*

The first characteristic provides that the employer remain "neutral"¹¹⁰ and not give anti-union speeches or engage in other forms of anti-union activity—that frequently puts the union at a disadvantage—during the organizational campaign. Indeed, the captive audience technique, in which employees are called together on company time and company property, has proved to be an extremely devastating technique in organizational campaigns. It is so devastating a technique that when the Board instituted postal ballots in limited circumstances in the 1990s, emphatic dissents were registered by the Board's Republican members on the ground that balloting over an extended period of time, which would allow the employees to get their ballots at their home addresses, would deprive the employer of an opportunity to use anti-union speech.¹¹¹

Thus, this anti-union speech or captive audience option is frequently eliminated or modified in a neutrality agreement. Frequently, part of the bargain is also that the union will control its commentary during its organizational campaign in a way that is not harmful to the employer.¹¹² These agreements, often couched in terms of waiver of the right to engage in activity that would be protected or allowed under the statute or waiver of access to the Board altogether,¹¹³ can involve either recognition on the basis of a card check or an election.¹¹⁴ The constant is that either process is verified by a neutral third party under the Supreme Court's ruling in *International Ladies' Garment Workers' Union v. NLRB*¹¹⁵ that it is an unfair labor practice to recognize a union that does not possess majority support even if predicated upon a good faith belief that it does.

Organizing and the Shift to a New Paradigm of Labor Law, 50 N.Y.L. SCH. L. REV. 515 (2005–2006).

110. The problem in defining what constitutes neutrality can be a considerable one as illustrated by the decision of the Sixth Circuit in *Dana Corp.*, 278 F.3d 548, which addressed the issue of whether neutrality means an obligation imposed upon the employer not to engage in any speeches at all, anti-union speeches generally, a particular kind of anti-union speech such as a captive audience speech, or speeches against a particular union—in this case the UAW.

111. See *San Diego Gas & Elec.*, 325 N.L.R.B. 1143, 1146–47 (1998) (Gould, Chairman, concurring). Prior to the Taft-Hartley Amendments, captive audience speech was unlawful. *NLRB v. Clark Bros. Co.*, 163 F.2d 373 (2d Cir. 1947). *Contra* *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946). The enactment of Taft-Hartley produced a reluctant Board shift. *Babcock & Wilcox Co.*, 77 N.L.R.B. 577 (1948). However, where an imbalance in avenues of communication was present, the rule was revived so as to provide an opportunity for the union to reply in *Bonwit Teller*, 96 N.L.R.B. 608 (1951), *rev'd on other grounds*, 197 F.2d 640 (2d Cir. 1952); the rule was abandoned by the Eisenhower Board in *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953), and revived by the Kennedy Board in *May Dep't Stores*, 136 N.L.R.B. 797 (1962), *enf. denied* by 316 F.2d 797 (6th Cir. 1962). Now moribund, *Montgomery Ward & Co. v. NLRB*, 339 F.2d 889 (6th Cir. 1965), the rationale of *Livingston Shirt* was left untouched by the Clinton Board. *Beverly Enterprises-Hawaii, Inc.*, 326 N.L.R.B. 335, 361 (1998) (Gould, Chairman, dissenting). *Cf.* *NLRB v. United Steelworkers of America*, 357 U.S. 357 (1957).

112. See, e.g., SERV. EMPLOYEES INT'L UNION, MODEL CONSENT ELECTION PROCEDURE AGREEMENT 6 (2005) (on file with the *Indiana Law Journal*).

113. See *Lexington Health Care Group, L.L.C.*, 328 N.L.R.B. 894 (1999). An almost identical version of this opinion circulated in my office in 1997 but lay dormant in Washington until 1999!

114. See *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

115. 366 U.S. 731 (1961).

Now, in this decade the clear drift of Board decisions alluded to above, as well as the Board's poor record in producing cases and the growing problem of delay, have prompted unions to search for more alternatives. It is clear that more energy is going into alternate avenues, given the Service Employees International Union's (SEIU) claim that it has recruited 100,000 members through this technique.¹¹⁶

Richard Trumka, Secretary Treasurer of the AFL-CIO, has claimed that eighty percent of union organizing takes place away from the Board.¹¹⁷ While it is appropriate to contractually prohibit captive audiences, to provide for union access, and to expedite procedures, I am skeptical about whether it is good public policy to eliminate employers' speech altogether.¹¹⁸ A well-informed electorate needs information, which is the product of robust speech. An energetic labor movement cannot or should not disagree with this policy of objectives. The answer is more speech, not less, albeit over an abbreviated time.

How much these non-Board techniques are being used is unclear, and how successful it is will only be borne out in the years to come. But clearly, employers have to have an incentive to enter into such agreements when the law is not present. This could come about through the threats or use of leafleting, various forms of secondary

116. E-mail from Judy Scott, General Counsel, SEIU, to William B. Gould IV (Oct. 23, 2006, 14:06:56 PST) (on file with the *Indiana Law Journal*).

117. Trumka said, "[U]nions are finding different ways to organize. Only 20 percent of new members last year were organized through elections conducted by the National Labor Relations Board." *Labor Needs to Find New Approaches in Order to Stem Decline, Academics Agree*, 81 Daily Lab. Rep. (BNA), at C-1 (Apr. 28, 2003).

118. As Justice Jackson explained in *Thomas v. Collins*:

Free speech on both sides and for every faction on any side of the labor relation is to me a constitutional and useful right. Labor is free to turn its publicity on any labor oppression, substandard wages, employer unfairness, or objectionable working conditions. The employer, too, should be free to answer and to turn publicity on the records of the leaders or the unions which seek the confidence of his men. And if the employees or organizers associate violence or other offense against the laws with labor's free speech, or if the employer's speech is associated with discriminatory discharges or intimidation, the constitutional remedy would be to stop the evil, but permit the speech, if the two are separable; and only rarely and when they are inseparable to stop or punish speech or publication.

323 U.S. 516, 547 (1945) (Jackson, J., concurring). Cf. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Caterpillar, Inc.* 321 N.L.R.B. 1178, 1184 (1996) (Gould, Chairman, concurring). Of course, it is hornbook law that fundamental statutory rights can be waived explicitly. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). Extant Board and circuit court law would appear to make insistence on free speech waivers to the point of impasse legally questionable. *Am. Cyanamid Co. v. NLRB*, 592 F.2d 356, 363-64 (7th Cir. 1979) (employer unlawfully insisted to impasse on union's waiver of right to file Board charges to seek redress for terminations during unfair labor practice strike); *Matlock Truck Body & Trailer Corp. v. NLRB*, 94 L.R.R.M. (BNA) 2456, 2462 (6th Cir. Mar. 22, 1976) (in action for contempt, court held employer's insistence on prohibition of right to file unfair labor practice charge was "impermissible restraint"); *Reichhold Chems.*, 288 N.L.R.B. 69, 71-72 (1988), *enforced in part sub nom. Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990); *Newberry Equipment Co.*, 157 N.L.R.B. 1527, 1534 (1966), *enforcement denied*, 401 F.2d 604 (8th Cir. 1968) (proposal deemed permissive where it waived right to file charges with the Board concerning the impact of a strike or lockout on employees).

activity¹¹⁹ short of strikes and picketing,¹²⁰ corporate campaigns, or resolutions at stockholders' meetings. A union, however, is limited in its ability to participate in stockholders' meetings. Another possible incentive for the employer to enter into such agreements is the existence of government contracts,¹²¹ and many employers fear that the government will not look kindly upon an anti-union campaign. This incentive is discussed in greater detail in Part IV, in connection with state governments, given the fact that the Bush Administration federal government would have little interest in this at present.¹²²

Meanwhile, there are a number of legal issues under the National Labor Relations Act that surround these neutrality agreements and card checks. The first arises out of the demand for such an agreement itself. Employers have claimed that the demand for a neutrality card check agreement is a demand for recognition, and since the Taft-Hartley amendments, the employer may demand a representation vote under the statute when a demand for recognition takes place.¹²³ For years, the Board has been careful to only allow such an employer petition when the union demand is for recognition itself. This is because of the potential that employer petitions will bring the representation process into play as soon as the employer gets wind of the union's organizational tactics. This would occur at a time when it is not propitious for the union to move forward with a vote and/or prior to the time that they have been able to acquire a majority.

The difficulty with the demand for a neutrality agreement is that frequently unions will demand immediate recognition on the basis of authorization cards at the same time. Now, however, when the union wants a neutrality or card check agreement, they would be well advised not to demand immediate recognition on the basis of cards so as to exercise more caution and to condition any recognition demand upon a procedure that would lead to majority status. Again, if the employer is willing to recognize the union on this basis, it still must engage in a card check by a neutral party because an erroneous good faith belief about the union's majority status could subject the

119. See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988).

120. See Steven Greenhouse, *Local 226, "The Culinary," Makes Las Vegas the Land of the Living Wage*, N.Y. TIMES, June 3, 2004, at A22.

121. In *Management Training Corp.*, 317 N.L.R.B. 1355 (1995), my Board asserted jurisdiction over all governmental contractors. Many of the federal circuits subsequently followed the *Management Training* precedent. See, e.g., *Aramark Corp. v. NLRB*, 179 F.3d 872 (10th Cir. 1999); *NLRB v. YWCA*, 192 F.3d 1111 (8th Cir. 1999); *NLRB v. Fed. Sec., Inc.*, 154 F.3d 751 (7th Cir. 1998); *Pikeville United Methodist Hosp. v. United Steelworkers*, 109 F.3d 1146 (6th Cir. 1997); *Teledyne Econ. Dev. v. NLRB*, 108 F.3d 56 (4th Cir. 1997).

The privatization trend has accelerated since *Management Training*. "Without a public debate or formal policy decision, contractors have become a virtual fourth branch of government. On the rise for decades, spending on federal contracts has soared during the Bush administration, to about \$400 billion last year from \$207 billion in 2000, fueled by the war in Iraq, domestic security and Hurricane Katrina, but also by a philosophy that encourages outsourcing almost everything government does." Scott Shane & Ron Nixon, *In Washington, Contractors Take on Biggest Role Ever*, N.Y. TIMES, Feb. 4, 2007, at A1.

122. See *infra* Part IV.

123. See 29 U.S.C. § 159(c)(1)(B) (2006).

employer to unfair labor practice liability. Thus a card check verification should indeed take place in the wake of an actual demand for recognition.

When there is no immediate demand for recognition, but rather simply insistence upon adoption of a recognition procedure, the union is simply utilizing another tactic, albeit at a point where it feels comfortable about its position and believes that either a card check or privately conducted election in lieu of cumbersome Board procedures will yield recognition. My view is that the Board was correct in the *New Otani Hotel*¹²⁴ decision, in which it held that a demand for a neutrality agreement is not to be equated with a demand for recognition and thus could not be deemed to trigger a valid employer representation petition. Accordingly, the Board would be required to dismiss the employer-filed petition, thus leaving the parties to their own devices. Said the Board in *New Otani*:

The Union's repeated requests that the Employer sign a neutrality/card check agreement necessarily contemplate an organizing drive during which the Employer would pledge not to express any opinion on whether its employees should choose the Union as their bargaining representative or to interfere with employees' organizational activities. As such, the Union's requests do not constitute a *present* demand for recognition. In all of the examples of such requests submitted by the Employer, the language utilized by the Union is conditional; for example, a Union press release provides that "[u]nder [the card check] process, which is endorsed by the NLRB, *if* a majority of the workers sign union cards, the hotel *would* recognize the union based on their signatures."¹²⁵

There are a couple of issues that are closely related. The first is the statute's prohibition against company assistance under section 8(a)(2) if the agreement contains procedures which allow, for instance, union access to company property that it would not ordinarily be entitled to under the Act and other facilities, which make its organizational efforts easier. Problems can arise in connection with opportunities—or the lack thereof—given to rival unions¹²⁶ which are not party to the agreement to assert their claims. In principle, provision for union access does not violate the Act—these

124. *New Otani Hotel & Garden*, 331 N.L.R.B. 1078 (2000). But the retreat may have been sounded already on the issue of waiver presented and resolved in *Lexington House*, 328 N.L.R.B. 894 (1999), by inferring no waiver in *U.S. Postal Service*, 348 N.L.R.B. No. 3 (Aug. 31, 2006), and *Advanced Architectural Metals, Inc.*, 347 N.L.R.B. No. 111 (Aug. 31, 2006).

125. *New Otani*, 331 N.L.R.B. at 1081 (emphasis in original).

126. Cards signed by an employee for more than one union cannot be counted toward majority status since they are presumed to be the product of peer pressure rather than employee free choice. *Katz's Delicatessen*, 316 N.L.R.B. 318, 330 (1995), *enforced* 80 F.3d 755 (2d Cir. 1996); *In re Le Marquis Hotel, L.L.C.*, 340 N.L.R.B. 485 (2003). Though only a majority of those voting must support the union for it to be certified, *NLRB v. Deutsch Co.*, 265 F.2d 478 (9th Cir. 1959), *New York Handkerchief Mfg. Co. v. NLRB*, 114 F.2d 144 (7th Cir. 1940), *RCA Mfg. Co.*, 2 N.L.R.B. 159 (1936), this political model has not been applied to voluntary or *Gissel* recognition where a majority of those in the bargaining unit must be evidenced. *Autodie Int'l, Inc.*, 321 NLRB 688, 691 (1996); *Komatz Constr., Inc. v. NLRB*, 458 F.2d 317, 322–23 (8th Cir. 1972). Again, this approach is predicated on the fact that NLRB processes include Board agent supervision, supposed statutory safeguards, and laboratory conditions in which to exercise employee free choice.

cases can only be resolved on a case-by-case basis in determining whether there is unlawful "assistance" within the meaning of section 8 (a)(2).

A second and important related issue is that of so-called conditional recognition agreements. In these agreements, the employer negotiates on wages, hours, and working conditions or the framework for an agreement that, it is understood, can only come into existence and be conditioned upon the union's obtaining majority support amongst the workers. Ever since the Board's *Majestic Weaving*¹²⁷ decision in the 1960s, the conventional view has been that such a statute provides for unlawful assistance. Yet it seems to me that this view is flatly wrong. Rather than rely upon mere rhetoric and promises that cannot be realized, employees, confronted by a conditional recognition agreement, are in a position to make a genuine and informed choice if they know what the union can obtain or is likely to obtain. For their part, employers frequently resist unionization because of their view that they will be saddled with excessive costs and work rules that interfere with their competitive ability. It makes more sense for them to know in advance what in fact the union will agree to—provided that this agreement is revealed to employees who may make (1) a genuine choice on the basis of it, and (2) are aware that the union does not yet possess the right to be recognized. A debate based upon genuine recommendations about employment conditions would ensue. And the potential for subsequent strife in the form of strikes or lockouts would be diminished.

Both the *New Otani Hotel* rule relating to demands for recognition and the conditional recognition cases are bound to come before the Board soon, and based upon everything we have seen, the Board will make it difficult for parties to proceed down this avenue. Similarly, my sense is that the same will be true of another issue that the Board will reconsider: the question of a recognition bar for an agreement obtained on a basis other than certification of an election conducted by the NLRB.

A recognition bar gives the parties a sense of stability and breathing space to establish their relationship and to negotiate a collective bargaining agreement.¹²⁸ As the Supreme Court said a half-century ago: "A union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hot-house results or be turned out."¹²⁹ This is particularly true in the first contract negotiations—a situation where most Canadian provinces will impose terms and conditions of employment through arbitration if the parties are unable to

127. *Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964), *enforcement denied* by 355 F.2d 854 (2d Cir. 1966), *overruling* *Julius Resnick, Inc.* 86 N.L.R.B. 38 (1949). However, there are circumstances under which the Supreme Court has authorized initial bargaining prior to the establishment of majority rule. See *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 292, 294–95 (1972); cf. *Canteen Co.*, 317 N.L.R.B. 1052, 1054–60 (Gould, Chairman, concurring), *enforced by* 103 F.3d 1355 (7th Cir. 1997). *Majestic Weaving* itself has been criticized by management labor lawyers, like former NLRB member Marshall Babson. See Marshall B. Babson, *Bargaining Before Recognition in a Global Market: How Much Would It Cost?*, 58 LAB. & EMP. REL. ASS'N SERIES 113 (2006), available at <http://www.press.uillinois.edu/journals/irra/proceedings2006/babson.html>.

128. *Keller Plastics Eastern, Inc.*, 157 N.L.R.B. 583, 587 (1966). The card check has always been a "favored element of national labor policy." *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 750 (7th Cir. 1981); *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978).

129. *Brooks v. NLRB*, 348 U.S. 96, 100 (1954).

resolve their differences. Arbitration is required because of the fact that the relationship is more likely to be fragile and difficult at that juncture when all of the parties are drafting contract language at a very basic level for the first time.

The Act and case authority have provided a so-called certification year through which this process may take place subsequent to an NLRB election, and courts have held that the analog to this in the case of voluntary recognition or recognition imposed through *Gissel*¹³⁰ unfair labor practice litigation is a “reasonable period of time.”¹³¹ In recent years, the Board has considered a reasonable period to be roughly analogous to the certification year, given the public policy that promotes voluntary recognition through means other than formal Board procedures.¹³² It is possible that this Board may reverse such case authority on the ground that the Act provides the best or exclusive means of recognition—a result which would be clearly contrary to the statute as interpreted by the Supreme Court, the circuit courts, and the Board for the past half-century.

Thus, there are difficulties with all three areas surveyed—the law, case handling, and policies toward self-help. This has meant more focus upon state law as a surrogate for federal regulation. It is to this matter that we now turn. New and important legislative and judicial developments have begun to occupy considerable attention.

IV. STATE LAW

Some scholars have argued that, given the enormous inadequacies of federal law, we should move away from the broad preemption principles enshrined ever since the Supreme Court’s landmark *Garmon*¹³³ decision and amend the statute so as to provide for state regulation.¹³⁴ Ironically, the preemption doctrine was thought to implement the principles of the statute more effectively inasmuch as repressive state regimes were ousted from the jurisdiction over strikes, picketing¹³⁵ and other forms of concerted activity.¹³⁶ The theory is that we should look to the Canadian system, which is based upon provincial legislation, as a model, notwithstanding the fact that labor management practices and the culture generally are very different in our neighbor north of the border.

A second argument against preemption is that most of the workers are in the industrialized “blue” states where unions could get more effective labor legislation than

130. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

131. The most recent Board pronouncements in this area can be found in *Levitz Furniture Co.*, 333 N.L.R.B. 717, 720 n.17 (2001).

132. See *MGM Grand Hotel, Inc.*, 329 N.L.R.B. 464 (1999).

133. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

134. See generally Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); Richard B. Freeman, *Will Labor Fare Better Under State Labor Relations Law?*, 58 LAB. & EMP. REL. ASS’N SERIES 125 (2006), available at <http://www.press.uillinois.edu/journals/irra/proceedings2006/index.html>; Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355 (1990); Gould, *Discussion*, *supra* note 3.

135. See *Garmon*, 359 U.S. at 236; *Garner v. Teamsters*, 346 U.S. 485 (1953).

136. See *Hill v. Florida*, 325 U.S. 538 (1945).

that which they are able to obtain nationally.¹³⁷ “Red” states like Mississippi, North Carolina, South Carolina, Alabama, and the like are forgotten in this equation. Thus, state legislation could repress workers under this antipreemption scheme and consequently, these ideas are misguided. However, an intermediate approach that has emerged around the periphery may provide an appropriate accommodation between state and federal law consistent with accepted preemption doctrine.

Some states have begun to enact legislation regulating the expenditure of funds obtained from the state by government contractors. For instance, New York has enacted legislation prohibiting the use of any “monies appropriated by the state for any purpose” to be “used or made available to employers to . . . train managers, supervisors or other administrative personnel regarding methods to encourage or discourage union organization.”¹³⁸ California has enacted similar legislation that prohibits the use of state grant or program funds in excess of \$10,000 by employers to “assist, promote, or deter union organizing.”¹³⁹ This legislation runs up against the doctrine of preemption and, specifically, a Supreme Court decision holding that the sanctions imposed upon state government contractors which related to recidivist behavior on the part of employers who violate the National Labor Relations Act was unconstitutional regulation because Congress had entrusted the subject matter to the National Labor Relations Board.¹⁴⁰ The backdrop for the litigation has been the two branches of

137. See Freeman, *supra* note 134.

138. N.Y. LAB. LAW § 211-a(2) (McKinney 2006).

139. CAL. GOV'T CODE § 16645.2(a) (West 2001).

140. See Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282 (1986). The Court's holding in *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218 (1993) (“*Boston Harbor*”), exempting that which is proprietary in nature, constitutes another limitation upon Gould.

Boston Harbor has been utilized to avert preemption in *Building and Construction Trades Department v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002). Cf. *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003); *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996). But the *Boston Harbor* exception thus far has not affected the outcome of the states' statutes prohibiting anti-union government contractor employer expenditures. See *Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277, 278 (7th Cir. 2006) (finding unconstitutional Milwaukee County's requirement that firms having contracts with the company for the provision of transportation and other services for elderly and disabled county residents “negotiate ‘labor peace agreements’ with any union that wants to organize employees who work on County contracts”). The Seventh Circuit's reasoning in *Milwaukee County* was that the ordinance was unconstitutional because “the labor-peace agreements at issue in this case were bound to affect the contractors' labor relations even when the contracts are with private hospitals and nursing homes. . . . [D]oubtless all or most of their employees who work on County contracts also work on private ones.” *Id.* at 279; see also *N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004 (7th Cir. 2005) (upholding a government contract, granted upon entering into a project labor agreement on the construction or renovation of renewable fuel plants, that required wages, benefits, and a no-strike clause be included), *cert. denied*, 127 S. Ct. 347 (2006). The requirement in *Lavin* was lawful because the spending only affected the finance project and not the conduct of the employer generally. Said the court in *Lavin*, “Illinois is concerned exclusively with how subsidized renewable-fuels projects contract for labor; its conduct is project-specific. . . . Because Illinois has limited its condition to the project financed by the subsidy, it has not

preemption: the Court's *Garmon*¹⁴¹ decision, which establishes an "arguably protected or prohibited" standard and its *Machinists*¹⁴² holding that some tactics affecting the balance of power employed by labor or management may be preempted when neither protected nor prohibited. Specifically the consequence is always the same—that is, the ouster of federal and state jurisdiction. As the Court said in *Garmon*, the goal is to prevent states from "setting standards of conduct inconsistent with the substantive requirements of the NLRA, [and] also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act."¹⁴³ Again, the rationale is that "[t]o leave the States [and non-Board actors] free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."¹⁴⁴

In the New York case, the district court held that the statute was preempted by the NLRA.¹⁴⁵ The court reasoned that *Machinists* applied to union organizing and the collective bargaining system. The court saw the New York statute as altering the balance of forces in the union organizational context in a manner inconsistent with *Machinists*. Said the court:

[E]mployees . . . have the right to refuse to join a union. . . . It is difficult, if not impossible to see, however, how an employee could intelligently exercise such rights, especially the right to decline union representation, if the employee only hears one side of the story—the union's.¹⁴⁶

The court also saw financial penalties and mandatory record-keeping procedures as deterrents of the exercise of free speech.¹⁴⁷

In an opinion authored by Judge Gibson for the Court of Appeals for the Second Circuit, the court engaged in a step-by-step analysis, which was similar to the process—but not the analysis and conclusion—of the Ninth Circuit in *Lockyer*.¹⁴⁸ (1) whether specific provisions of the National Labor Relations Act protections and

engaged in 'regulation' . . . and its conditions are not preempted by federal labor law." *Id.* at 1007.

141. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

142. Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132 (1976).

143. *Gould*, 475 U.S. at 286 (citing *Garmon*, 359 U.S. at 247).

144. *Garmon*, 359 U.S. at 244.

145. Healthcare Ass'n of N.Y. State, Inc. v. Pataki, 388 F. Supp. 2d 6 (N.D.N.Y. 2005), *rev'd*, 471 F.3d 87 (2d Cir. 2006).

146. *Id.* at 23 (citations omitted). This appears to be at odds with the Supreme Court's view that the statute does not contemplate the employer's championing of employee organizational rights. See *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996).

147. One difficulty with the court's approach in *Pataki* is that it relied heavily upon an opinion by the Court of Appeals for the Ninth Circuit involving the California statute that was subsequently reversed by a 12–3 vote in which the court, en banc, held that the law was constitutional. See *Chamber of Commerce v. Lockyer*, 422 F.3d 973 (9th Cir. 2005), *rev'd*, 463 F.3d 1076 (9th Cir. 2006). However, the Court of Appeals for the Second Circuit reversed the district court opinion. *Healthcare Ass'n of N. Y. State, Inc. v. Pataki*, 471 F.3d 87 (2d Cir. 2006).

148. *Pataki*, 471 F.3d 87.

prohibitions are the subject of state regulation; (2) whether the dispute addressed by the state is “identical” to the subject matter that would be brought before the NLRB; and (3) if not identical, whether preemption could still be evidenced by a “strong showing” that the state had “interfered” with protection afforded by the Act.¹⁴⁹ The court viewed the *Garman* and *Machinists* analyses of the constitutionality of state legislation as virtually the same.¹⁵⁰

In *Lockyer II*,¹⁵¹ a far-ranging opinion authored by Judge Fisher, the Ninth Circuit held that *Machinists* preemption was inapplicable to the statute in question because it involved organizational activity. Said the court, “Federal courts of appeals have applied *Machinists* pre-emption [sic] in the context of collective bargaining between organized labor and employers, not in the context of organizing, which is the subject of AB 1889 [the California statute in question].”¹⁵²

The court, however, noted that even if *Machinists* extended to organizational activity—and it must be noted that the demarcation line between organizational activity and the collective bargaining process is often a difficult one to draw in reality—the statute still would not be preempted because California was making a choice about how it should expend its funds rather than a judgment about the “free play of economic forces” in collective bargaining or organizational activity vis-à-vis labor and management. The court stressed the fact that the employer had the ability to use its own funds as it wished in anti-union campaigns and that neutrality was not required as a condition of receiving state funds. The court said:

Employers remain free to convey their views regarding unionization, and thus do exercise their First Amendment rights, provided only that they not use state grant and program funds to do so Nothing prevents the employer from raising additional funds from a non-state source and using those funds for advocacy purposes.¹⁵³

Judge Fisher’s opinion also emphasized the point that the statute did not affect “zones of activity” which are to be left free from all regulation.¹⁵⁴ The court reasoned that since the Board regulated much employer and union speech¹⁵⁵—in contrast to the tactics that were preempted in *Machinists*, which were neither protected nor prohibited and thus not regulated—California was acting consistently with federal labor policy in the sense that the subject matter was regulated. This theme in *Lockyer II* is one of the more vulnerable aspects of the opinion because it rests upon the view that if Congress

149. *Id.* at 96.

150. *Id.* at 107.

151. *Chamber of Commerce v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006). For an in-depth discussion of *Lockyer*, see Stephen F. Befort & Bryan N. Smith, *At the Cutting Edge of Labor Law Preemption: A Critique of Chamber of Commerce v. Lockyer*, 20 LAB. LAW. 107 (2004). *Contra* Debra Charish, *Union Neutrality Law or Employer Gag Law? Exploring NLRB Preemption of New York Labor Law Section 211-A*, 14 J.L. & POL’Y 779 (2006).

152. *Lockyer*, 463 F.3d at 1086.

153. *Id.* at 1088 (footnote omitted).

154. *Id.* at 1089.

155. *Cf. Eldorado Tool*, 325 N.L.R.B. 222, 225 (1997) (Gould, Chairman, concurring in part and dissenting in part); *Caterpillar, Inc.*, 321 N.L.R.B. 1178, 1184 (1996) (Gould, Chairman, concurring).

regulates an activity pursuant to national labor policy, a state restriction of a similar activity is allowed. This is hardly consistent with most of the bedrock preemption cases, which are precisely to the contrary. Those cases hold that the mere fact that the state is passing the same policy as the federal government is not a defense against preemption because the state might interpret the standard in a different way. This poses the potential for conflict. Indeed, the regulation of that which “encourages or discourages” as in New York, or “deters union activity” as in California, is the job of the Board in both unfair labor practice and representation proceedings.¹⁵⁶

Neither the Second or Ninth Circuits’ opinions seemed to grasp this. Said the Ninth Circuit:

[T]he parties do not dispute that the NLRB has no interest in resolving the central controversy that a state court would have to resolve in enforcing AB 1889, namely, whether state funds were used to “assist, promote, or deter union organizing.” Far from being the same as a question the NLRB might consider, a suit under the California statute would entail accounting only for the employer’s possible use of state funds.¹⁵⁷

Similarly, the Second Circuit said that the Board’s jurisdiction would not be “usurp[ed]” because claims about encouragement or discouragement of union activities were not identical to those before the Board in employer free speech cases, noting that the Board itself had no authority to move against state government interference with its jurisdiction.¹⁵⁸ The court said that since New York law only applies to encouragement and discouragement and does not mimic the language of section 8(c), the employer free speech proviso prohibits only retaliatory threats of force—and thus New York law did not “define the contours of the NLRA.”¹⁵⁹ But NLRB litigation about encouragement or discouragement of union activities or deterrents is frequently linked to threats. These cases are grist for the Board’s mill! Additionally, the mere fact that state law involves procurement activities does not diminish analytical overlap between federal and state

156. This problem can be seen most graphically in some of the cases that have arisen in the wake of the New York law, where the employer contention is that the statute’s existence is inconsistent with employee rights. *See, e.g.,* Herbert G. Birch Serv., Inc., Case No. 29-RC-10227 (Jul. 15, 2004), available at [http://www.nlr.gov/shared_files/Regional%20Director%20Decisions/2004/29-RC-10227\(7-15-04\).pdf](http://www.nlr.gov/shared_files/Regional%20Director%20Decisions/2004/29-RC-10227(7-15-04).pdf); Independence Residences, Inc., Case No. 29-RC-10030 (June 7, 2004), available at [http://www.nlr.gov/shared_files/ALJ%20Decisions/JD\(NY\)-25-04.pdf](http://www.nlr.gov/shared_files/ALJ%20Decisions/JD(NY)-25-04.pdf).

157. *Lockyer*, 463 F.3d at 1093. In a similar vein, the court said:

[W]ere the NLRB to consider an unfair labor practice charge arising from the employer’s conduct, it would focus on whether the employer had interfered with the employees’ section 7 rights, regardless of whether the employer used state funds in the process. In contrast, under AB 1889, the California court would determine only whether an employer used state grant or program funds to influence employees, not whether that attempt violated the NLRA. Because the statute focuses solely on the use of state funds, there is no identity of claims, and the primary jurisdiction test is not met.

Id. at 1094 (emphasis in original).

158. *Healthcare Ass’n of N. Y. State, Inc. v. Pataki*, 471 F.3d 87, 100–01 (2d Cir. 2006).

159. *Id.*

governments. It was a willingness to exalt the form of litigation over all else that led to the broad preemption approach adumbrated in *Garmon*.¹⁶⁰ Accordingly, *Garmon* purported to obliterate judicial reliance on whether, for instance, state regulation existed through labor management relations law, antitrust law, or anything else.¹⁶¹

A related point made by the courts is that Congress itself has prohibited the use of federal funds to discourage unionization—therefore, the California, and by inference, the New York policies would mimic federal laws providing for minimal conditions of employment. This is also constitutionally problematic given the fact that federal legislation reflects congressional intent and pre-emption is an attempt to discern intent. State legislation, in contrast to federal law, cannot be a basis for determining congressional intent. The confluence of *Garmon* and *Machinists* translates into congressional legislation that prohibits most state laws on matters relating to the NLRA—a hostility not present when contrary congressional intent is expressed through separate legislation. Federal legislation, supreme under the preemption clause, will control over competing state attempts to regulate labor relations.

On the *Garmon* branch of preemption, the Ninth Circuit said that since section 8(c), the so-called free speech proviso, simply serves as a defense to unfair labor practice findings, activity that was protected was not at issue. This is in fundamental opposition to the *Pataki* opinion in New York. The Ninth Circuit was in accord with the Court of Appeals for the Sixth Circuit, which wrote:

As § 7 grants *employees* the right to organize or to refrain from organizing, however, it is unclear how any limitation on Dana's behavior during a UAW organizational campaign could affect Dana's employees' § 7 rights . . . § 8(c) does not protect an employer from agreeing not to express its views. In fact, far from recognizing § 8(c) as codifying "an absolute right" of an employer to convey its view regarding unionization to its employees, . . . we have stated that an expression of an employer's views or opinion under § 8(c) is merely "permissible."¹⁶²

Accordingly, the Ninth Circuit was of the view that statutory construction providing for affirmative employer free speech rights under the statute constituted a "peculiar proposition" and that this activity, like others, was neither protected nor prohibited by the statute.¹⁶³ Again, as the Ninth Circuit reasoned, the idea that employer speech is fundamental to the statutory scheme seems inconsistent with what the Supreme Court

160. San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236, 247–48 (1959); William B. Gould, *The Garmon Case: Decline and Threshold of "Litigating Elucidation"*, 39 U. DET. L.J. 539, 556 (1962).

161. Considerable confusion emerged through Supreme Court jurisprudence antedating *Garmon*. The best examples are *International Union, United Automobile, Aircraft and Agricultural Implement Workers v. Russell*, 356 U.S. 634 (1958), and *United Construction Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954), which seemed to muddy the waters.

162. *Int'l Union v. Dana Corp.*, 278 F.3d 548, 559–60 (6th Cir. 2002) (citations omitted) (footnotes omitted) (emphasis in original).

163. *Chamber of Commerce v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006).

said a decade ago when it noted that an employer could not be viewed as the champion of worker rights.¹⁶⁴

The court analogized to the grant of state jurisdiction in tort actions involving libel,¹⁶⁵ where a traditional exercise of state jurisdiction was viewed as paramount. In the Ninth Circuit's view, the same principles applied to a state procurement policy that did not condition the receipt of funds upon adherence to certain standards, but rather precluded expenditure in activities that would deter union activity. Thus, the court deemed California's neutrality policy to be consistent with constitutional preemption requirements.

But I think that the Second Circuit's view on employer free speech and section 8(c) in *Pataki* is the better position. There, New York contended that section 8(c) did not provide free speech protection because it said that coercive speech was merely an unfair labor practice or at least evidence of an unfair labor practice—and the right to noncoercive speech was stated in the negative. This view had been appealing to the Ninth Circuit. But said Judge Gibson:

It is surely a familiar concept that one way of granting rights is to state that government cannot punish certain conduct. For instance, the First Amendment does not explicitly grant freedom of speech, but instead says that, "Congress shall make no law . . . abridging the freedom of speech." Obviously, we interpret the First Amendment as protecting free speech. By the same token, section 8(c) protects employer speech from infringement by the NLRB.¹⁶⁶

Noting that the legislative history of the Taft-Hartley amendments stressed the importance of free speech, the court said that the law properly constitutes the basis for *Garmon* preemption.¹⁶⁷ This is the better view in my judgment. Employer free speech is one of the tactics that is properly part of the mix to which *Garmon* has provided preemption. But this is hardly the end of judicial analysis.

The extraordinary rise in privatization¹⁶⁸ has produced a government procurement corollary. Despite the analytical difficulties in both opinions, the *Lockyer* result may be deemed to be correct by virtue of analogy to state jurisdiction over defamation and libel actions where preemption has failed, notwithstanding the congressional policy promoting free speech.¹⁶⁹

164. See *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996).

165. *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966).

166. *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87, 100 (2d Cir. 2006) (citation omitted).

167. *Id.* at 97.

168. See, e.g., Paul Krugman, Op-Ed., *Victors and Spoils*, N.Y. TIMES, Nov. 19, 2002, at A31; Richard W. Stevenson, *Government May Make Private Nearly Half of Its Civilian Jobs*, N.Y. TIMES, Nov. 15, 2002, at A1; see also *supra* note 121.

169. *Linn*, 383 U.S. at 55. Similarly, see *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977), where state jurisdiction was also partially asserted. The "peripheral" exception to *Garmon* contained in *International Association of Machinists v. Gonzales*, 356 U.S. 617 (1958), seems inapplicable here.

In *Pataki*, the ultimate resolution will apparently turn on factors not present in *Lockyer* because *Lockyer* applies only to state grants and not contracts. Said the court in *Pataki*:

CONCLUSION

The problems with the law and policies promoting freedom of association and collective bargaining are enormous. Never has the threat to the implementation of federal labor policy been more substantial. It is difficult to know whether union activity involving attempts to obtain neutrality and to circumvent the NLRB will be utilized and, if utilized, successful. State legislation in the form of the issues presented in *Pataki* and *Lockyer* are complex and the road toward constitutionality is paved with minefields. The relentless union decline indicates that unions are either not using the tactics discussed or are using them ineffectively.

Moreover, these issues are inseparable from the broader policies that have discouraged unionization outside of labor law. For instance, the failure of the United States to adopt comprehensive health care legislation has placed some corporations at a competitive disadvantage with companies abroad and, sometimes, with nonunion domestic employers.¹⁷⁰ Corporations in both the developed and underdeveloped world outside the United States do not make the substantial contributions to medical care and pension payments to workers covered by collective bargaining agreements, as is the case with American employers in the United States. In the main, such assistance is provided by government. It is difficult to see how labor law reform, or indeed union organizational activity outside the law, alone can make a significant contribution under these circumstances when organized American companies are at such a competitive disadvantage.

We conclude that there are vital fact issues that must be determined before we can decide whether section 211-a is limited to a restriction on the use of State funds or whether it overreaches in an attempt to regulate the employers' speech regardless of whether State funds are at issue. First, we must know whether the State contends that section 211-a restricts employers' use of funds earned from fixed-price contracts with the State. If so, then section 211-a is broader than necessary to serve the efficiency purpose claimed by the State. Second, if the State maintains cost-based measures that allow reimbursement for unionization campaign expenses, the State must demonstrate why it is not feasible for the State to avoid such expenses by designating such costs as non-reimbursable. Finally, we must know whether section 211-a as applied does indeed create obligations upon receipt of monies that originated with federal and local governments. To the extent that the State applies section 211-a to burden the use of money that cannot be considered State funds, it burdens NLRA speech and satisfies the threshold conditions for *Garmon* preemption.

Finally, even after concluding that some applications of section 211-a supported by the record would satisfy the threshold for *Garmon* preemption, we must consider whether "the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility," that the State's action should not be preempted absent a clear indication of Congressional intent to do so.

Pataki, 471 F.3d at 106-07 (citations omitted).

170. See Malcolm Gladwell, *The Risk Pool: What's Behind Ireland's Economic Miracle—and GM's Financial Crisis?*, THE NEW YORKER, Aug. 28, 2006, at 30; Roger Lowenstein, *The End of Pensions?*, N.Y. TIMES, Oct. 30, 2005, § 6 (Magazine), at 56.

Nonetheless, because it is important for the policies of law to be implemented, there must be renewed focus upon the NLRB and Washington.¹⁷¹ Perhaps legislation will reemerge in 2007 to provide for recognition on the basis of authorization cards.¹⁷² However, as the Canadian experience demonstrates,¹⁷³ it is important to require that employees provide some form of payment to the union to demonstrate their support for collective bargaining. Where the law mandates union recognition through authorization cards—in contrast to simply allowing the parties to negotiate agreements for the establishment of recognition on the basis of the same cards—certainty of worker support should be akin to the secret ballot box. Some form of payment by employees to unions in the form of an initiation fee or dues should be a necessary prerequisite for majority support.¹⁷⁴ Perhaps a super-majority of 55 or 60 percent of card signers should be required as well, so as to resolve any doubt about majority status.

The Board, the principles of independent adjudication, and labor-management relations are in a very different state than when Bill Stewart and I first began our careers in the 1960s in Washington, D.C. The ability of the policies and statutes to reverse course remain in doubt. But one hopes the next generation of young lawyers from Indiana University School of Law and beyond will be encouraged by the exemplary professional performance of William Stewart to take up the task to which he committed himself more than four decades ago.

171. See William B. Gould IV, Op-Ed., *Why Labor Law Is Not Working*, S.F. CHRON., Nov. 21, 2006, at B7.

172. See, e.g., H.R. 800, 110th Cong. (2007). Indeed, on March 1, 2007, the House of Representatives passed the Employee Free Choice Act of 2007, by a vote of 241-185. See William B. Gould IV, *Employee Free Choice Act: Bill No Cure-All for What Ails Labor*, SAN JOSE MERCURY NEWS, Mar. 6, 2007, at 11A; William B. Gould IV, *Workers Deserve Free Choice*, SEATTLE POST-INTELLIGENCER, Mar. 7, 2007, at B7; Editorial, *The Right to Organize*, N.Y. TIMES, Mar. 6, 2007, at A20; Editorial, *The Right Choice for Workers*, CHICAGO TRIB., Mar. 6, 2007.

173. See generally GEORGE W. ADAMS, CANADIAN LABOUR LAW (2d ed. 1993). British labor law on union recognition is of recent vintage. See Alan Bogg, *Politics, Community, Democracy: Appraising CAC Decision-Making in the First Five Years of Schedule A1*, 35 INDUS. L.J. 245 (2006).

174. This is compatible with NLRB reasoning, which, while promoting the use of cards in some circumstances, imposes more severe standards, such as not counting cards where employees have signed on to more than one union.

